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NO. 80-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TWIN FALLS CANAL COMPANY, a corporation, its Board of Directors, JOSE BARINAGA, THOMAS CLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY,

Petitioners,

v.

CANYON VIEW IRRIGATION COMPANY, a corporation,

Respondent.

REVISED
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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TWIN FALLS CANAL COMPANY, et al.,

Petitioners,

v.

CANYON VIEW IRRIGATION COMPANY,

Respondent.

REVISED PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Idaho entered in this proceeding on September 9, 1980.

QUESTION PRESENTED

Whether the Supreme Court of the State of Idaho denied due process of the law to Petitioners by deciding issues not presented to it by the stipulation, briefs and arguments of the parties, without giving Petitioners notice or opportunity to be heard and present evidence on those issues.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho, reported at 619 P.2d 122, appears in the Appendix at pages 1-47. The relevant portion of the decision of the state trial court is found in the Appendix at pages 64-91.

JURISDICTION

The opinion of the Supreme Court of the State of Idaho was dated and entered on September 9, 1980. A timely petition for rehearing was denied on November 26, 1980, (App. pg. 154) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States (due process):

> "nor shall any State deprive any person of life, liberty or property without due process of law;"

Idaho Code § 7-704:

"Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

STATEMENT OF THE CASE

The Twin Falls Canal Company, hereinafter referred to as "TFCC", is a canal company operating an irrigation water distribution system for 202,000 acres in southcentral Idaho since 1905. (The remaining Petitioners are members of TFCC's Board of Directors and the operations manager.) Canyon View Irrigation Company, hereinafter referred to as "Canyon View" is a recently formed company desiring to convey water to lands of its stockholders lying west of TFCC's existing system.[1]

One way for Canyon View to accomplish its aims would be to enlarge and use a major portion of TFCC's existing canal system to convey Canyon View's water. After failing to get TFCC's consent,

---

1. There are no subsidiary companies or entities wholly owned by another corporation involved in this case.

Canyon View originally filed the case in State District Court to obtain access to TFCC's system for purposes of surveying. Thereafter, Canyon View amended its complaint to seek a declaratory judgment on its right to condemn into TFCC's system. The parties entered into an extensive stipulation of facts, and included the issues which were being submitted for decision. (The Stipulation is found in the Appendix at pages 48-63.)

One of the issues presented for decision was:

> "a. Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physical system and compel operation thereof by the Canal Company for both parties?" (emphasis supplied) (App. pg. 61)

The state trial court, pursuant to agreement of the parties, accepted the stipulated facts as the sole basis for its decision, without an evidentiary hearing, and proceeded to decide the

issues presented by the parties. The trial court held that what Canyon View proposed was, initially at least, a public use. However, the trial court held that Canyon View could not force TFCC to maintain the enlarged system, and therefore, no public use was to be served by Canyon View's proposal. The trial court concluded its statements on this issue by observing:

> "Section 7-704, Idaho Code, requires the taking to be 'necessary' to CV's public use. Absent public use, the question of necessity is not before us." (App. pg. 91)

Canyon View thereafter appealed on the issues formulated by the parties, and the Idaho Supreme Court reversed, holding that, while TFCC could probably not be forced to operate and maintain the enlarged system, the parties could jointly operate and maintain it. (App. pp. 19-21.) The court also found Canyon View's proposal to be "necessary" to its

public use. (App. pp. 17 & 18) The decision of the court below, entered September 9, 1980, was the first notice to Petitioners that the Idaho court was going to consider questions of joint operation and maintenance, and therein decide "necessity" as a matter of law.

TFCC filed a timely petition for rehearing, and a brief in support thereof, (App. pp. 92-103, 104-146, respectively) bringing to the State Supreme Court's attention the denial of due process involved by its decision of issues not presented to it. (App. pp. 92-95, 99-103, 104-126) The state court denied the Petition for Rehearing without opinion. TFCC then filed a Petition for Recall of Remittitur again urging the federal constitutional issues. (App. pg. 147) Upon denial of that Petition, TFCC now petitions this Court for review by certiorari.

REASONS FOR GRANTING THE WRIT

The issue presented for review by this Court finds its basis on the Fourteenth Amendment to the Constitution of the United States. This Court is asked to intervene and review a denial of due process by a state court. However, the background of facts giving rise to that denial are unique and yet constitute a potential for continued denials of due process to party litigants before courts in the various states. This is not an isolated occurrence. This Court has had two cases from Hawaii presented to it on petitions for writ of certiorari, and denied the petitions. (County of Hawaii vs. Sotomura, 517 P.2d 57, cert. den. 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111, 1974; McBride Sugar Company vs. Robinson, 517 P.2d 26, cert. den. 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135, 1973.) Both cases presented similar questions. In

each instance, a later case challenging the validity of the state court decision was filed in the U.S. District Court in Hawaii, and resulted in a judgment appealed to the Ninth Circuit. (See pp. 18-19 hereof) This petition presents an opportunity for this Court to give some guidance to state appellate courts on their duties to confine themselves to issues presented to them.

The Petitioner submits that the Supreme Court of the State of Idaho violated the mandates of the Fourteenth Amendment as to due process by expanding upon and virtually disregarding the issues presented to it for review. The parties to this litigation tried specified issues before the trial court in the State of Idaho, submitting those issues, and the facts upon which they were based, by stipulation. A part of the Stipulation of Facts, which formed the founda-

tion of the case in the trial court, recited:

> "If the court determines that eminent domain is available to the plaintiff (Canyon View), plaintiff's plan contemplates that after construction of the modifications to be constructed by plaintiff, those facilities would be operated by the Canal Company (TFCC) by order of the Court in the condemnation action." (App. pg. 58)

By further stipulation the parties also specified the particular issues to be decided in the trial court, one of the issues being:

> "(a) Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physicial system and compel operation thereof by the Canal Company for both parties?" (App. pg. 61.)

The briefs submitted to the trial court, and the respective arguments, conformed to the above-referenced stipulation and concentrated on the defined issue of whether or not Canyon View could condemn into Twin Falls Canal Company system, enlarge it, and then compel

operation of the enlarged system by the Canal Company. The trial court confined its decision to those specific issues, rendering a judgment in favor of the Canal Company on the issue of whether Canyon View could compel it to maintain the enlarged system. Canyon View appealed, and on appeal, again adhered to the issue raised before the trial court. Canyon View stated the issue in its opening brief before the court below as follows:

> "2. Whether the court has the power to order the parties to do such acts as are necessary to complete such a project, including the power to order TFCC to transport water for CV upon payment of a reasonable O & M charge for services rendered, and the power to order co-mingling of CV water with TFCC water in the portion of the TFCC canal system which is condemned." (Appellant's Brief, p. 11)

In support of its arguments, Canyon View, in its points and authorities, stated:

> "C. Under the powers of eminent domain and the statutes of Idaho the

> court has the power to order TFCC to maintain that part of the TFCC canal system which would be carrying commingled waters of CV and TFCC." (Appellant's Brief, p. 15)

The entirety of the case below, both in the trial court and the Appellate Court, focused on Canyon View's proposal, which was to enlarge the necessary portions of TFCC's system, and then compel TFCC to operate and maintain the enlarged system. Canyon View did not propose, and the parties did not discuss, joint operation and maintenance of the enlarged system. The parties also did not discuss the "necessity" of the taking, since that issue was not reached in the trial court, nor was a decision on that issue required as the case was structured by the parties, and as presented to the Court below.

A hearing on joint operation and maintenance and necessity is critical for TFCC. No evidence has been presented on

whether it is physically possible to jointly operate and maintain 70 miles of canals and laterals, or on the availability of insurance, or whether it is possible to allocate maintenance responsibilities based on the precise enlargements which have yet to be presented by Canyon View. Since Canyon View has not yet made a specific proposal as to what it intends to do to the TFCC system, those facts are not yet available. A decision on forcing TFCC to maintain the enlarged system did not require specifics. A decision on joint operation and maintenance does require specific facts, none of which have yet been presented to any court.

On appeal, the Supreme Court of the State of Idaho inferentially held that the trial court was correct in holding that Canyon View could not compel operation of the enlarged system by the Canal

Company. But thereafter the court deviated from the precise issues presented for its consideration and approved a relationship of "concurrent ownership" and a concurrent right to operate and maintain. (App. pp. 19-21) The court further expanded the scope of its efforts and decided the issue of necessity upon a record that was designed by the litigants to permit a decision upon the issue of right to condemn and compel operation by TFCC. (App. pp. 17-18) The denial of a hearing on the issue of necessity alone, was contrary to Idaho law. See Grangeville Highway Dist. vs. Ailshie, 49 Idaho 603, 290 Pac. 717 (1930) where the court held that the condemnee is entitled to a hearing on the issue of "necessity".

Clearly, had the issues of joint operation, maintenance or necessity been proposed by Canyon View below, Twin Falls Canal Company would have had the oppor-

tunity to present facts to the trial court, which might then have been reviewed by the Appellate Court, which would have highlighted the inadequacies of such a proposal and might also have presented the law to the court in direct opposition to such a contention. However, in light of the stipulation presented to the lower court, which fixed the issues to be determined, such facts and legal analysis were not necessary, and were not presented.

The Supreme Court of the State of Idaho in the case of Call vs. Marler, 89 Idaho 120, 403 P.2d 588, (1965) recognized the binding effect of stipulations entered into by party litigants. Other states have expanded upon that principle, recognizing the binding effect of stipulations upon the court. Kitterman vs. Eagle Pine Company, 257 Pac. 815, (Ore. 1927); Wolf Corporation vs. Louis, et

al., 11 Ariz. App. 352, 464 P.2d 672 (1970); Taylor vs. Murray, 232 P.2d 367 (Utah 1951); and Trafton vs. Youngblood, 69 Calif. Rpts. 568, 442 P.2d 648 (1968).

This Court has recognized that principle in the case of Hackfeld & Company vs. U.S., 197 U.S. 442, 25 S.Ct. 456, 49 L.Ed. 826, (1905) wherein the Court held that a stipulation by the parties deleting the issue of negligence from consideration by the lower court was binding upon the court and that the court could not thereafter enter a finding contrary to that stipulation.

The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. Brinkerhoff-Farris Co. vs. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) Federal courts have long recognized that the sua sponte deci-

sion by a court of issues beyond those presented for its consideration is a denial of due process. Consider the following:

Court of Appeals for the Third Circuit:

"One of the basic tenets of American jurisprudence is that procedural fairness requires that each party have notice of the issues involved and an opportunity to be heard at a meaningful time and in a meaningful manner." (Citing Armstrong vs. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Goldberg vs. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Morrissey vs. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972))

American Motor Inns, Inc. vs. Holiday Inns, Inc., 521 F.2d 1230, 1244 (3rd Cir. 1975)

Court of Appeals for the Ninth Circuit:

"It would be a violation of the due process clause of the Fifth Amendment for the district court or this court to compel appellees to submit to the court's determination issues not pleaded by either of the parties, just because the decision may be beneficial to the persons not parties to the action, . . ." (Hynes vs. Grimes Packing Co., 185 F.2d 338, 341 (9th Cir. 1950)

District Court for the District of Hawaii:

"As appears above . . . the effect of the judgment of the Supreme Court (state) was to deprive the plaintiffs of their property, water and water rights, without affording any of them an opportunity to be heard in their defense. The state court violated not only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued. . .

"On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against (the deprivation)." Robinson vs. Ariyoshi, 441 F.Supp. 559, 580 (D.C. Hawaii 1977)

"Whenever a party is to be deprived of property, he is entitled to a meaningful hearing before the fact. Fuentes vs. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d. 556 (1972) . . . (citing additional authority) . . . Fuentes restated the basic reasons underlying the requirement of procedural due process:

> 'When a person has an opportunity to speak up in his own defense, and when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property can be prevented. It has long been recognized that 'fair-

ness can rarely be obtained by secret, one-sided determination of facts decisive of rights...' (citing authority)

"The Hawaii Supreme Court, without any claim to the land having been asserted by the state or county, nor any hearing on title, sua sponte decreed that all of the owners' property seaward of the vegetation line belonged to the public. . . . The failure of the Hawaii Supreme Court to give the owners a meaningful hearing before relocating their boundary inland affords adequate ground for granting the injunction requested by the owners." Sotomura vs. Co. of Hawaii, 460 F.Supp. 473, 477 (D.C. Hawaii 1977)

Similar rulings have been enunciated by this Court.

"Under the 14th Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." Standard Oil Co. vs. Missouri, ex. rel. Hadley, 224 U.S. 270, 281, 32 S.Ct. 406, 56 L.Ed. 760, 767 (1912)

In the later case of Saunders vs. Shaw, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), this Court reversed the Supreme Court of the State of Louisiana, holding that that court's decision, rendered on rehearing, denied a litigant of due process of law. The state court suit was brought for an injunction against the collection of a drainage tax and the plaintiff in error, a bond holder, was allowed to intervene as a defendant. In the course of the case, the trial court excluded evidence offered by the plaintiff concerning benefits to the land. Defendant did not offer evidence on those issues. On appeal, the state supreme court relied on the excluded evidence to reverse the trial court. In this Court, the defendant contended he had been denied due process.

This Court held that the defendant was correct, stating:

> "Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view." 224 U.S. at 319, 61 L.Ed. at 1165

Recognizing the technical nature of this complaint, this Court commented that it was very likely that the State Supreme Court felt that to remand the case to the trial court would be a fruitless gesture as the end result would be the same. The court rejected that rationale, stating:

> "Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principal of the Miles Salt Company case that to remand it would be an empty form,--a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendants rights are protected without giving him a chance to put his evidence in." 244 U.S. at 319, 61 L.Ed. at 1165

Shaw has further applicability for the present case as it relates to the effect of raising a constitutional issue in a State Supreme Court after that court has rendered its initial decision. In Shaw, the plaintiff in error did not allege a violation of the Fourteenth Amendment until the assignment of errors which were filed the day before the state chief justice granted the writ of error to the Supreme Court of the United States. Under those circumstances, this Court held that the issue was timely raised.

> "Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or take other precautions in advance." 244 U.S. at 320, 61 L.Ed. at 1165.

The key element in Shaw, and later cases, is that the litigant has raised the question or issue at his first opportunity in response to an unanticipated ruling by the State Court. See State of Missouri, ex. rel. vs. Gehner, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 876, (1930) and Herndon vs. State of Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935).

CONCLUSION

It is clear from the record that the Petitioners did not have notice that the issues of joint operation and maintenance and necessity were to be litigated in this lawsuit, thus denying them the opportunity to be heard on those issues and defend their position. Despite that denial, and in the face of a stipulation of the parties submitting only certain questions for decision, the Supreme Court of the State of Idaho rendered definitive decisions on those issues and severely prejudiced the Petitioners in any subsequent litigation on the issues involved. It is respectfully submitted that there can be no clearer denial of due process. Your Petitioners pray that a writ of certiorari be granted and that this Court review the judgment entered by the Supreme Court of the State of Idaho on the 9th day of September, 1980.

DATED this ____ day of February, 1981.

Respectfully submitted,

NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

By: _____
Thomas G. Nelson
Attorney for Petitioners

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1980 Opinion No. 146

IN THE SUPREME COURT OF THE STATE OF IDAHO
No. 13174

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation,

Plaintiff-appellant,

vs.

TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY,

Defendants-respondents.

Twin Falls term, April 1980

Filed: Sept. 9, 1980

R.H. Young, Clerk

* * * * * * * * * * *

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Sherman J. Bellwood, District Judge.

Appeal from declaratory judgment denying one irrigation company the right

to condemn into the canal system of another irrigation company. Reversed.

John Hepworth of Hepworth, Nungester & Felton, Buhl, Idaho, for appellant.

Thomas Nelson of Nelson, Rosholt, Robertson, Walker, Tolman & Tucker, Twin Falls, Idaho, for respondents.

Paul M. Beeks, of Smith & Beeks, Twin Falls, Idaho, amicus curiae.

Walker & Spink, Twin Falls, Idaho, for amicus curiae Bell Rapids Mutual Irrigation Co.

BAKES, J.

In this case we address several significant questions presented by the attempt of one irrigation company to condemn a right to enlarge and use a portion of another irrigation company's existing canal system.

Plaintiff appellant Canyon View Irrigation Company (CV) and defendant respondent Twin Falls Canal Company (TFCC) are non-profit irrigation companies. TFCC currently operates canals on an easement granted to TFCC's

predecessor by the State of Idaho pursuant to a 1903 contract. The easement runs through the property of a number of landowners who are not parties to this action but appear as amicus curiae. TFCC transports at time approximately 3,000 cfs of water through its canal.

CV has purchased, or is in the process of purchasing, approximately 300 cfs of Snake River water and seeks to put that water to beneficial use on land located west of TFCC's canal system. CV has no canal and there exists no natural waterway by which CV's water can be transported by gravity to its stockholders' lands. Therefore, CV seeks to divert its water from the Snake River into TFCC's canal system and then reclaim a like amount, with due allowance for seepage and evaporation, at a headgate closer to its irrigation project site.

TFCC's existing canal system is apparently unable to accommodate CV's extra water. CV therefore proposes to improve, expand and enlarge the canal system where necessary. CV is willing to bear the entire expense of any such improvements. It is also willing to pay for its pro-rata share of the enlarged canal system's maintenance costs.

CV approached TFCC with this proposal, but TFCC refused to negotiate for the common use of the canal system. CV then commenced this action in the district court for declaratory relief. In its complaint, CV asked the court below to declare its right to proceed against TFCC in eminent domain by condemning a common right to use TFCC's canal system. Alternatively, CV claimed that its landowners had the right to become shareholders of TFCC as third party beneficiaries of the 1903 contract

between TFCC's predecessor and the Idaho State Board of Land Commissioners.

The case was tried upon stipulated facts. The parties also presented a stipulated statement of issues to the court below. Besides the two main issues regarding eminent domain and the interpretation of the 1903 contract, the parties asked the district court to settle some legal questions in the event that it found CV was entitled to condemn an interest in the canal system. First, the parties wished to know what effect the condemnation suit would have on the various owners of land adjacent to TFCC's canal system. Second, the parties requested that the court determine the proper measure of damages in the event CV's plan was implemented through condemnation proceedings.

The district court concluded that CV would not be entitled to the requested

relief under either the law of eminent domain or the 1903 contract. While we agree that CV's shareholders do not enjoy any rights as third party beneficiaries under the contract, we conclude that CV can proceed by way of eminent domain, although the current state of the record precludes us from completely resolving all of the issues presented to the court below.

I.

In order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its power of eminent domain to private individuals. I.C. §§ 42-1102 and -1106. See White v. Marty, 97 Idaho 85, 540 P.2d 270 (1975). These statutes permit landlocked individuals to condemn a right of way through the lands of others for purposes of irrigation.

To condemn such a right of way, the property owners must proceed under Idaho's law of eminent domain, found in I.C. §§ 7-701 et seq. Article 1, § 14, of the Idaho Constitution permits the power of eminent domain to be exercised only in furtherance of a "public use." The irrigation and reclamation of arid lands is a well recognized public use, Idaho Const. art. 1, § 14, and art. 15, § 1; I.C. § 7-701(3), even if the irrigation project is ostensibly intended to benefit only private individuals. Clark v. Nash, 198 U.S. 361, 25 S.Ct. 676 (1905), affirming 75 P. 371 (Utah 1904). "[Article 1, § 14, of the Idaho Constitution] confers the right to condemn for individual use on the theory that the development of individual property tends to the complete development of the entire state." Codd v. McGoldrick Lumber Co., 48 Idaho 1, 10, 279 P. 2908, 300 (1929).

Easements or rights of way are one type of property subject to condemnation for a public use. I.C. § 7-702(2).[1] See Hughes v. State, 80 Idaho 286, 328 P.2d 397 (1958). Rights of way may also be condemned for the purposes of concurrent use in common with the existing owners. I.C. § 7-703(5);[2] Portneuf

---

1. "7-702. ESTATES SUBJECT TO TAKING.--The following is a classification of the estates and rights in lands subject to be taken for public use:

    ....

    "(2) An easement, when taken for any other use.

    ...."

2. "7-703. PRIVATE PROPERTY SUBJECT TO TAKING.--The private property which may be taken under this chapter includes:

    "5. All rights of way for any and all the purposes mentioned in section 7-701, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owners thereof, when necessary, but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and least private injury.

    ...."

Irrigating Co., Ltd. v. Budge, 16 Idaho 116, 100 P. 1046 (1909). In such cases, the original easement owner is not really being deprived of his easement outright; only its exclusive use. The condemnation imposes a form of concurrent ownership. Both the condemnor and condemnee will enjoy the right to use the easement.

Generally, property already devoted to a public use, like TFCC's canal system, cannot be taken by eminent domain unless the condemnor proposes to put the property to a "more necessary public use." I.C. §§ 7-703(3) and -704(3).[3]

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3. "7-703. PRIVATE PROPERTY SUBJECT TO TAKING.--The private property which may be taken under this chapter includes:

....

"3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

...."

"7-704. FACTS PREREQUISITE TO TAKING.--Before property can be taken it must appear:

"1. That the use to which it is to be applied is a use authorized by law.

"2. That the taking is necessary to such use.

"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

However, the condemnor need not demonstrate a "more necessary public use" when condemning only the right to the common use of an existing right of way previously appropriated for public use. Portneuf Irrigating Co., Ltd. v. Budge, supra; Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho 1, 165 P. 1128 (1916). Although the condemnation must still be "necessary" and must be accomplished in a "manner most compatible with the greatest public benefit and least private injury," I.C. § 7-703(5), absolute necessity is not required. It is enough if the taking is reasonably necessary. Erickson v. Amoth, 99 Idaho 907, 591 P.2d 1074 (1978); Marsh Mining Co. v. Inland Empire Mining & Milling Co., supra. The party seeking to condemn an easement must show a more necessary public use only if the existing owner's use "will be defeated or seriously inter-

fered with ...." Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho at 12, 165 P. at 1130. Essentially, where the former owner's use is defeated or seriously impaired, the condemnation amounts to an outright taking rather than an appropriation of concurrent ownership, thereby triggering the greater necessity requirement found in I.C. §§ 7-703(3) and -704(3).

This is not a case of first impression. This Court had occasion to apply the same legal principles in Portneuf Irrigating Co., Ltd. v. Budge, 16 Idaho 116, 100 P. 1046 (1909) [hereinafter "Portneuf I"],[4] a case virtually identical to this one. The Portneuf-

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4. The Portneuf case returned to this Court sub. nom. Portneuf-Marsh Valley Irr. Co., Ltd. v. Portneuf Irrigation Co., Ltd., 19 Idaho 483, 114 P. 19 (1911) [hereinafter referred to as "Portneuf II"]. The Portneuf II appeal discussed the propriety of certain jury instructions regarding damages.

Marsh Valley Irrigation Co., Ltd. had commenced an action against the Portneuf Irrigating Co., Ltd., "whereby it sought to condemn sufficient of the [latter company's] canal and right of way for the purpose of so enlarging a section of the canal as to not only carry the volume of water now owned and used by the [Portneuf Irrigating Company], but, also such additional volume of water as will be necessary for the purpose of irrigating ... land lying under the Portneuf-Marsh Valley Company's canals." Id. at 120, 100 P. at 1047. The potential condemnor sought to enlarge the canal considerably more than plaintiff does here. It also sought to commingle its waters with the waters of the other irrigation company, to be reclaimed downstream[5] for

5. For purposes of convenience, the terms "downstream" and "upstream" will be used to describe the relative location of points in an artificial watercourse even though strictly speaking the term "stream" is a misnomer.

delivery to the irrigation site. The Portneuf Irrigating Company attempted to block the condemnation, arguing that the proposed use was not more necessary than the existing use of the canal. Conceding the point, the Court nevertheless approved of the condemnation.

> "The question, however, arising in this case is not that of actually condemning [Portneuf Irrigating Co.'s] ditch and irrigation and water right, but it is rather an effort to condemn such of its right of way as is not being actually used as a canal for carrying water, so that the [Portneuf Irrigating Co.] may use that right of way in the construction of a larger canal through which [it] may continue to carry its water, and through which the Portneuf-Marsh Valley Company may also carry the water necessary for the irrigation of its lands. In other words, it is proposed to so enlarge the present canal that it will do the service required for both companies. This principle has been repeatedly recognized in condemnation proceedings ...." Id. at 132, 100 P. at 1052 (emphasis added).

Portneuf I is no legal aberration, nor is the concept there articulated a stranger to western water law. See 1 W.

Hutchins, Water Rights Laws in the Nineteen Western States 281-82 (1971); 4 Waters & Water Rights § 341 (R. Clark ed. 1970) [hereinafter cited as "Water Rights"]. Virtually all of the western states have enacted statutes providing that an individual may acquire the right to enlarge or to use an existing canal in common with the owners thereof, upon payment of proper compensation. Cal. Water Code § 1800 et seq. (West); Colo. Rev. Stat. § 37-86-107; N.M. Stat. Ann. §§ 72-1-5 and 75-5-15; N.D. Cent. Code §§ 61-01-04 and 61-01-05; Okla. Stat. Ann. tit. 82, §§ 105.3 & 105.4 (West); Or. Rev. Stat. § 772.310; S.D. Compiled Laws Ann. § 46-8-1; Utah Code Ann. §§ 73-1-6 & 73-1-7; Wash.Rev. Code Ann. § 90.03.040; Wyo.Stat. § 1-26-401.

Applying Idaho's eminent domain statutes and the Portneuf I rule to the stipulated facts of this case, we con-

clude that CV may condemn the right to enlarge and use the existing canal in common with TFCC. TFCC contends that CV's common use and expansion of the canal system would interfere with TFCC's existing use by increasing certain risks. For example, TFCC points to the problem of allocating water losses due to evaporation and seepage. TFCC also contends that increased canal base pressure may require certain capital improvements necessary to assure canal bank safety. TFCC also notes that it might have to pay greater insurance premiums to cover its increased exposure to lawsuits in the event of canal breakage. See Brizendine v. Nampa Meridian Irr. Dist., 97 Idaho 580, 548 P.2d 80 (1976).

These problems are real, but not insurmountable. Competent engineering should solve many of the problems. Hydrologists can calculate water trans-

mission losses with considerable accuracy. Primarily, however, we think that the additional risks to which TFCC will be exposed are more properly considered as elements of compensation. When the parties get to the compensation stage of the condemnation proceeding, the factfinder can put a price tag on these problems.

The issue of compensable damages must be distinguished from the question of whether the condemnee's existing use is defeated or seriously impaired. Certainly, any condemnation such as this will cause inconvenience, complications, and additional expense in the day-to-day operation of a canal system. The dispositive issue is not whether canal operation in general is interefered with, but whether TFCC's ability to deliver water to its shareholders is defeated or seriously interfered with. There is

nothing in the record to suggest that a competently engineered enlargement of a portion of TFCC's canal system designed to accommodate an extra 300 cfs of water would render it unable to deliver water to its shareholders.

Since the record does not suggest that CV's enlargement and common use would displace, defeat or seriously impair TFCC's already existing public use of the canal system, CV need not establish a "more necessary public use." I.C. §§ 7-703(3) & -704(3); Marsh Mining Co. v. Inland Empire Mining & Milling Co., supra; Portneuf Irrigating Co. v. Budge, supra. As previously mentioned, only a showing of reasonable necessity is required. We think the record supports that showing.

The parties stipulated that "no natural waterway exists by which Canyon View's water can be transported by

gravity from the Snake River to its stockholders' land." It seems clear that this fact, when considered in conjunction with the excessive cost of constructing a parallel canal system, would satisfy the necessity requirement. See State ex rel. Ballard v. Superior Court, Kittitas County, 195 P. 1051 (Wash. 1921). There is no indication in the record that there exist suitable, feasible or less costly alternatives to the proposed concurrent use of TFCC's system. We also note that the construction of a new canal system would result in the substantially greater loss of private lands which CV would need to acquire to establish a new canal system. By permitting CV to condemn into TFCC's canal system, we think the right of eminent domain is exercised "in the manner most compatible with the greatest public benefit and least private injury," as required by I.C. § 7-703(5).

TFCC raises several other objections to CV's proposed condemnation. TFCC argues that CV really needs to acquire two so-called other rights in order to transport its water through the canal system: a right to compel TFCC to operate and maintain the canal system on CV's behalf and a right to exchange water with TFCC. TFCC maintains that neither of these rights can be acquired in a condemnation action.

As to the first, we have held CV may acquire a certain property interest by condemnation. This property interest is best described as the concurrent ownership of a right of way. Perhaps it is true that CV cannot compel TFCC to operate and maintain the canal on its behalf. But if that fact alone prevented CV from acquiring concurrent ownership of the right of way, the condemnation of rights of way in common with existing

owners would be all but impossible. We are aware of no case where the right to enlarge and use an artificial watercourse was denied on that ground.

Basically, we view the post-condemnation relationship of CV and TFCC as a species of co-tenancy or tenancy in common. See Moss v. Rose, 41 P. 666 (Ore. 1895); 4 Water Rights § 341.2 (1970). Both parties have the right to the use of the canal right of way; neither can exclude the other. See, e.g., In re Randall's Estate, 64 Idaho 629, 132 P.2d 763 (1943). Other than introducing CV's 300 cfs of water into the enlarged canal at the point of diversion, there would be nothing for TFCC to do. The record indicates that CV will remove its water, less any transmission loss, at the end of TFCC's canal. Removal of the water will be CV's problem. If TFCC ever ceases to operate

the canal for its own needs, then CV as co-tenant will have to assume that responsibility. The party who undertakes to operate the canal is entitled to a pro-rata contribution for operation and maintenance costs. I.C. § 42-1206; 3 Kinney on Irrigation & Water Rights § 1457 (2d ed. 1912). See also Cal. Water Code § 1782 (West); N.M.Stat.Ann. § 75-5-15; Utah Code Ann. § 73-1-7. As easement co-tentants, both TFCC and CV would have a duty to the owners of the servient estate, i.e., the adjacent landowners, to maintain and repair the right of way. Gibbens v. Weisshaupt, 98 Idaho 633, 570 P.2d 870 (1977); Rehwalt v. American Falls Reservoir Dist. No. 2, 97 Idaho 634, 550 P.2d 137 (1976); Suitts v. McMurtrey, 97 Idaho 416, 546 P.2d 62 (1976).

TFCC also argues that CV's proposed common use is prohibited by its inability

to legally compel TFCC to exchange water within the canal system. In support of this proposition, TFCC relies on I.C. § 42-105[6] and Berg v. Twin Falls Canal Co., 36 Idaho 62, 213 P. 694 (1922). Because we hold that CV's proposals do not involve an "exchange" of water, but rather a "commingling", both I.C. § 42-105 and the Berg case are inapposite.

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6. "42-105. USE OF NATURAL CHANNELS--MEASUREMENT OF COMMINGLED WATER--APPLICATION FOR RIGHT TO EXCHANGE WATER.--The water to which a person may be entitled by reason of valid permit or license issued by the department of water resources of water right heretofore established by diversion and application to beneficial use under the construction of this state may be turned into the channel of another stream and mingled with its water, and then reclaimed; and water may be turned into any ditch, natural channel or waterway from reservoirs or other sources of water supply, and such water may be substituted or exchanged for an equal amount of water diverted from the stream, creek or river into which such water flows, or any tributary thereof, but in reclaiming the water so mingled, or diverting water in lieu thereof from any such stream, creek, river or tributary, the amount of water to which prior appropriators may be

One commentator defines the practice of commingling as follows: "[W]ater appropriated out of one stream may be turned into the channel of another stream, mingled with the water already flowing there, and then reclaimed ...." 1 W.Hutchins, Water Rights Laws in the

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(6. Cont'd)

entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. Approval of any such exchange of water shall be obtained by filing application for permit to appropriate water under the provisions of section 42-202, Idaho Code, in the event the water to be exchanged is unappropriated public water, or by filing an application to exchange water as provided in this act in the event the water to be exchanged has been previously appropriated by the applicant under the constitution or statutes of this state. In no case, however, shall any such exchange of water be approved by the department of water resources until the department has received an agreement in form approved by the attorney general signed by the person proposing the exchange and each person or organization owning rights to water with whom such exchange is proposed to be made. Any such exchange of water hereafter made without the approval of the department of water resources as provided in this act shall be invalid."

Nineteen Western States 603 (1971). Hutchins points out that an exchange differs from commingling, although the two concepts are closely related and may in some circumstances overlap. Essentially, commingling occurs when waters are mixed and later separated. An exchange takes place when different waters are traded without being mixed. See Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972); In re Wilder Irrigation Dist., 64 Idaho 538, 136 P.2d 461 (1943); Daniels v. Adair, 38 Idaho 130 220 P. 107 (1923); Reno v. Richards, 32 Idaho 1, 178 P. 81 (1918).

I.C. § 42-105 permits commingling of water. It also permits an exchange or substitution of water provided the parties to such exchange agree and obtain the approval of the Department of Water Resources. The section does not discuss commingling in canals. This omission is

not significant. The co-tenant of a canal system must necessarily be able to commingle the waters with other co-tenants. If not, condemnation of concurrent ownership in a canal system would never be possible. It would not have been possible in Portneuf I. Were we to accept TFCC's argument, we would be forced to overrule Portneuf I.

We also think that the case of Berg v. Twin Falls Canal Co., 36 Idaho 62, 213 P. 694 (1922), is inapplicable. Berg's plan was to divert TFCC water from the canal system at the upper end and replace it downstream with waste water which he had appropriated. Berg sought to condemn two points in the canal system: the point upstream where the water was diverted and the point further downstream where it was replaced. Thus, the Berg plan did not involve a commingling, as in Portneuf I and the instant case, but involved a true

exchange within a system of artificial watercourses. The Court first observed that Berg "could condemn a right to use a portion of the system of [TFCC], if necessary, to convey a water appropriated by them to land upon which it was to be used." Id. at 65, 213 P. at 695. The Court specifically cited Portneuf I for this proposition. The Court further noted that Berg could "mix waters ... in a natural water course for a similar purpose," Id., citing the predecessor to I.C. § 42-105. The Court clearly did not view commingling as an impediment to a Portneuf-type condemnation. The Court concluded:

> "A right to such a use of the system cannot be acquired by a condemning of the right to use a small part of the Low Line Canal [downstream] for the purpose of turning the water of Rock Creek into it, and a small part of the main canal [upstream] for the purpose of taking out a like amount. Whether appellants could condemn a right to use the whole system for the purpose contemplated is not before us, and need not be decided." 36 Idaho at 66, 213 P. at 695.

We therefore conclude that CV can condemn a right to use a portion of the canal system in common with TFCC; in this respect, the law is the same as it was in 1909 when Portneuf was decided and in 1922 when Berg was decided. We think that conclusion is consistent with the well recognized policies in this state of maximum economic utility of water resources and the development and reclamation of arid lands. Nothing in the statutes or prior case law convinces us otherwise.

II.

Canyon View next contends that its shareholders have rights as third party beneficiaries under the 1903 contract between the state and Twin Falls Land & Water Co., TFCC's predecessor. The trial court held that CV had no rights under the 1903 contract. We affirm that ruling.

In the first paragraph of the contract, TFCC's predecessor agreed to construct a canal system and:

> "to sell shares of water rights in said canal system from time to time as hereinafter provided, to the persons filing upon the lands hereafter described, and to the owners of other lands not described herein but which are susceptible of irrigation from this canal system said shares of water rights to be sold on the terms herein provided ...." (Emphasis added.)

The question presented is whether CV's shareholders, as owners of lands "susceptible of irrigation from this canal system," are entitled to purchase shares in TFCC.

This question is answered by the second paragraph of the contract, which reads, in relevant part, as follows:

> "The main canals of this system shall have a carrying capacity when completed sufficient to deliver simultaneously one second foot of water to every eighty acres of land described in this contract, together with all other lands susceptible of irrigation from said canals as nearly as the same can be estimated and agreed upon between the State

Engineer and the Engineers of the [Twin Falls Land & Water Co.]" (Emphasis added.)

In order to ascertain the intentions of contracting parties, the contract must be construed as a whole and considered in its entirety. Beal v. Mars Larsen Ranch Corp., Inc., 99 Idaho 662, 586 P.2d 1378 (1978); West v. Brenner, 88 Idaho 44, 396 P.2d 115 (1964). Idaho recognizes the right of a third party to enforce a contract "made expressly for [his] benefit." I.C. § 29-102. However, absent a manifest intent to benefit the third party, courts are hesitant to enforce a contract on his behalf.

> "'Thus, before recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary. Furthermore, such a contract must be strictly construed in favor of the person against whom such liability is asserted.'" Dawson v. Eldredge, 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) quoting Sachs v. Ohio Nat. Life Ins. Co., 148 F.2d 128, 131 (7th Cir. 1945).

See also Just's, Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978).

When the applicable portions of the first and second paragraphs are read together it seems clear that the right to transport water "to the owners of other lands ... susceptible of irrigation" is a right belonging to the irrigation company and not the landowners. The second paragraph specifically requires the agreement of the state engineer and the engineers of TFCC's predecessor. Nowhere does the contract state that the completed canal system must be expanded to accommodate a second operating water distribution organization. In fact, the eleventh paragraph of the contract entitles TFCC's predecessor to increase the appropriation of water and the capacity of the canal, but requires that

such increase take place within five years from the date of the contract.

Construed together, these contract provisions indicate that TFCC's predecessor could extend the canal system to "other lands susceptible of irrigation." The contract does not, however, expressly extend any similar rights to third party landowners.

III.

The parties also asked the trial court to settle the following issue: what persons will be necessary and indispensable parties to a suit brought by Canyon View for the condemnation of a right to utilize TFCC's right of way?

We think it would be premature to resolve this issue at this stage of the controversy. Canyon View's proposals are still in an embryonic stage. The stipulation of facts submitted by the parties indicates only that Canyon View will need

to enlarge some portions of the condemned section of the canal system, while other portions will need little or no alteration. However, the record does not contain any plans specifying the exact nature and location of any alterations. Therefore, at this stage of the controversy, there is no way of determining which of the adjoining landowners' property interests will be affected to such an extent that a taking will have occurred. See Tibbs v. City of Sandpoint, 100 Idaho 667, 603 P.2d 1001 (1979).

Other questions of a similar nature remain unanswered. The record does not clearly indicate the width of TFCC's right of way along the portions of the canal system sought to be condemned. That information might be required in order to determine whether Canyon View proposes to expand the canal outside of

the physicial boundaries of TFCC's present easement. Nor does the record reflect whether more flood easements need be acquired or whether the capacity of existing flood easements need be increased. It seems clear that these questions too cannot be resolved at this stage.

We recognize that the parties' primary concern in this proceeding was to determine whether Canyon View had a right to proceed at all, and for that reason they did not attempt to construct an exhaustive record. These questions should be resolved in the condemnation action itself.

IV.

The final question presented by this appeal concerns the proper measure of damages. As in other eminent domain actions, the condemnee is entitled to "just compensation" for the taking of his

property. Idaho Const. art. I, § 14; I.C. § 7-711. For purposes of analysis, we think it is best to segregate the compensable damages into three categories: construction or enlargement costs; damages for prospective interference; and the value of the loss of exclusive use.

Canyon View readily admits its liability for the construction costs, as well as "any damages caused by interfering with the operation of the canal during the period of construction." It may be that the parties will find it to be in both their interests to have CV agree to pay these costs as they accrue rather than attempt to estimate these costs at the trial of the condemnation action. The trial court may also find that damages caused by interference during the period of construction may be bested handled by requiring Canyon View

to furnish a bond during this period. In any event, there is no issue raised on appeal as to these items as damages.

Canyon View does not, however, admit liability for any prospective damages inherent in the proposed joint use of the canal system. When an easement owner loses the exclusive right to use his easement, he may well be damaged by the prospective future interference with his use, even if such interference does not prevent or seriously impair his enjoyment of the easement. For example, TFCC complains that its exposure to lawsuits in the event of canal breakage or similar misfortune is significantly increased by virtue of an increase in the number of farmers dependent on TFCC's operation of the canal system and the larger volume of water which might escape. If proven, that increase in exposure is compensable, and may manifest itself in the form of

increased insurance premiums. Similarly, TFCC may have to acquire flood easements of a greater capacity. If proven, the cost of that acquisition is also compensable. These are but two examples of prospective costs of administration that TFCC might be required to bear as a result of CV's concurrent use of its right of way.

The above category of damages was recognized by this Court when the Portneuf case was appealed for the second time. Portneuf-Marsh Valley Irr. Co., Ltd. v. Portneuf Irrigating Co., Ltd., 19 Idaho 483, 114 P. 19 (1911). In Portneuf II, the Court addressed the propriety of a jury instruction on compensation. The Court approved of an instruction that required the jury to include "all damages, present and prospective, that are the natural or reasonable incident of the improvement made or the work to be

constructed ...." Id. at 487, 114 P. at 19.[7]

The third category of compensation concerns the damages due to TFCC's loss of the right to exclusive use of the right of way. As a general rule, damages for the taking of an interest in property are measured by the fair market value of the property taken plus severance damages to any remainder. State v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112 (1955); Idaho Farm Development Co. v. Brackett, 36 Idaho 748, 213 P. 696 (1923). See generally, 4 Nichols on Eminent Domain § 12.1 (1977). As the Portneuf II Court realized, however, conventional

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7. In a similar case, Tanner v. Provo Bench Canal & Irr. Co., 121 P. 584 (Utah 1911), aff'd 239 U.S. 323, 36 S.Ct. 101 (1915), the trial court ordered the condemning party to furnish a perpetual bond to insure payment of future expenses incurred as a result of the enlargement and subsequent concurrent use. We think that is an appropriate remedy available to the trial court.

approaches to market value assessment are of little use in a condemnation case where the interest acquired is the concurrent use of an already existing canal system. The parties themselves came to a similar conclusion in their stipulation of facts, having agreed that the TFCC canal has no market value in the usual sense.

TFCC contends that "the damage for the loss of the exclusive right of TFCC ought to be measured by the benefit to Canyon View." TFCC maintains that this benefit should include an appropriate percentage of today's cost of its canal system. We disagree. In Portneuf II, the Court rejected the measure of damages proposed here by TFCC. "Compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to

the proceedings ...." Id. at 488, 114 P. at 20 (quoting secondary authority). On this ground, the Portneuf II Court held it was error to instruct the jury that damage should include the amount saved by the condemnor by reason of the existence of the condemnee's canal system. Therefore, TFCC is not entitled to damages based upon what CV will save by condemning into TFCC's canal rather than constructing an entire new canal system.

Similarly, CV should not have to pay a proportionate part of the depreciated historical cost of constructing TFCC's existing canal system, since TFCC is not being deprived of the existing canal system. In view of the fact that TFCC will retain the right to use the canal system as before, we think TFCC is entitled to only nominal damages for the property interest acquired by CV. Salt Lake City v. East Jordan Irr. Co., 121 P.

592 (Utah 1911); Tanner v. Provo Bench Canal & Irr. Co., 121 P. 584 (Utah 1911), aff'd 239 U.S. 323, 36 S.Ct. 101 (1915). See City of Lewiston v. Brinton, 41 Idaho 317, 239 P. 738 (1925); 4 Nichols on Eminent Domain § 12.41[1] at 734-36 (1977).

The judgment of the district court is hereby reversed in part and affirmed in part, and remanded for further proceedings consistent with this opinion.

DONALDSON, C.J., and McFADDEN, J., concur.

BISTLINE, J., dissenting.

The gist of this "controversy" is found in the fifth paragraph of the Court's opinion. There the Court states that the parties brought the suit because they "wished to know the effect the condemnation suit [which might be brought] would have on various owners of the land adjacent to Twin Falls Canal Company's canal system," and wanted to be advised in advance of "the proper measure of damages in the event Canyon View's plan was implemented through condemnation proceedings."

That the appeal should be dismissed is self-evident. The district court should not have entertained the action in the first place. That neither of the parties raises the non-justiciability of the controversy does not mean that the trial court was obligated to render what can only be considered a strictly

advisory opinion. Every question put to the Court could and would necessarily be resolved in a condemnation action, had one been brought. But until such an action is brought, the courts of this state are not empowered to render purely advisory opinions. That the questions are important, and the answering thereof might well serve to aid in bringing the parties together so that they can resolve their differences without going to court in a truly adversary proceeding, is insufficient to confer jurisdiction upon the courts. Thomas v. Riggs, 67 Idaho 223, 175 P.2d 404 (1946); Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141 (1935).

The parties here may be unable to agree, but they are not presently caught up in any controversy. As with any other potential litigants, where they are unable to resolve their different views

and enter into a contract, legal advice is available elsewhere than from the courts. If still unable to agree, and if Canyon View decides to test out its right to condemn against Twin Falls Canal Company, the applicable statutes are as available to guide it, and the courts as open to receive it, as for any other person or entity.[1]

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1 In recent months other parties with problems have gone into the courts for resolution, proceeded through trials, and presented their appellate briefs in this Court--only to be finally told that their actions and appeals were dismissed as improperly brought or taken. Winn v. Winn, 101 Idaho __, 611 P.2d 1055 (1980); Revello v. Revello, 100 Idaho 829, 606 P.2d 933 (1980); Pichon v. Broekemeier, 99 Idaho 598, 586 P.2d 1042 (1978).

In each of those cases the parties were properly in this Court seeking final resolutions to truly adversary proceedings already litigated and determined in district court. Here, by contrast, unless Canyon View initiates a condemnation action, time of the district court and this Court will have been expended in fruitless endeavor. It is difficult for me to reconcile our acceptance of this case with our refusal to consider the merits in those above mentioned.

In Wood v. Class A School District No. 25, 78 Idaho 75, 298 P.2d 383 (1956), Justice Taylor in writing for a unanimous Court quoted Chief Justice Hughes' language in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) for the proposition that a "controversy" in the constitutional sense "must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot." 78 Idaho at 78, 383 P.2d at 385. Justice Taylor then went on to say:

> "It follows that the controversy must be one that is real and substantial, and if the complaint fails to disclose some legal interest in the plaintiff, no justiciable controversy is presented for defense." Id.

Recently, after stating that there should be some delineation of the rule that a declaratory judgment action cannot

be used to secure an advisory opinion, the Wyoming Supreme Court in Cranston v. Thompson, 530 P.2d 726 (1975), adopted two statements from the courts of Kansas and Tennessee:

> "'*** Courts will not render advisory opinions on abstract questions of law about which there is only a disagreement rather than an actual controversy between the parties. ***' Wagner v. Mahaffey, 195 Kan. 586, 408 P.2d 602, 605.
>
> "'The Declaratory Judgments Act gives courts no power to determine future rights or controversies in anticipation of events that have not occurred ***.' Glasgow v. Fox, 214 Tenn. 656, 383 S.W.2d 9, 13." 530 P.2d at 728-29.

The Arizona Supreme Court, in Moore v. Bolin, 220 P.2d 850, 851 (1950), similarly said, quoting from 16 Am.Jur. Declaratory Judgments § 9 at 282 (1950):

> "It is well settled that a proceeding for a delcaratory judgment must be based upon an actual controversy.... No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or answers a moot or abstract question."

That court proceeded to quote with approval from an annotation at 87 A.L.R. 1205 at 1215 (1933):

> "'A declaratory relief statute only justifies a declaration of rights upon an existing state of facts, not one upon a state of facts which may or may not arise in the future. Nor will future rights be determined in anticipation of an event that may never happen.***'
>
> "The writer of the note cites many cases sustaining the general rule as stated, supra, when declaratory relief is sought as to facts involving future events, and in the same note as to fact involving contingent events." 220 P.2d at 852.

Concluding, the Arizona court held:

> "It is the court's view that the facts pleaded by appellant do not show a present existing controversy which permits the court to adjudicate any present rights. The allegations merely show an intent to do certain things in the future all of which are dependent upon future events and contingencies within control of the appellant." Id.

Obviously, Canyon View's promotion will be vastly aided if it can pursue its program armed with a judicial decree spelling out in advance its rights as

against Twin Falls Canal Company. But it is for attorneys--not the courts--to oblige Canyon View with that advice, especially in the form of a Supreme Court opinion with apparent res judicata effect against Twin Falls Canal Company and its members and shareholders. The United States Court of Appeals for the District of Columbia, in Helco Products v. McNutt, 137 F.2d 681 (D.C. Cir. 1943), in speaking of the use of advisory judicial opinions by private business, observed:

> "Much of the uncertainty of business management could, perhaps, thus be eliminated. What a comfort it would be, if a declaratory judgment could be made as available as an inter-office memorandum, whenever a board of directors meets to consider a proposed new venture. But that millenium has not yet arrived." 137 F.2d at 684.

I do join the Court in making proper obeisance to the decision heralding the arrival of that millenium.

DUNLAP, J., PRO TEM, concurs.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation, Plaintiff vs. TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY, Defendants.	Civil No. 28301 STIPULATION OF FACTS

* * * * * * * * * * *

COMES NOW the plaintiff and defendants and stipulate to the following facts:

I.

That Canyon View is a nonprofit irrigation company incorporated under the laws of the State of Idaho.

II.

That Twin Falls Canal Company is a mutual nonprofit irrigation operating company, incorporated under the laws of the State of Idaho. That Jose Barinaga, Thomas Olmstead, Bryan Harris, Jr., William L. Watt and William Rude are the duly elected Board of Directors of Twin Falls Canal Company and that Clifford Montgomery is the manager of Twin Falls Canal Company.

III.

That according to the best present information of the parties, the canals and diversion works referred to by plaintiff are on an easement reserved by § 42-2036 Idaho Code, as granted by the 1903 Contract with the State of Idaho and the land adjoining the canal and the servient estates are owned by various individuals, corporations, and perhaps by the United States. If any party hereto

finds evidence tending to show the right of way of the Twin Falls Canal Comany was obtained other than pursuant to § 42-2036 or is other than an easement, this stipulation shall not prevent introduction of such evidence in this or any other proceeding.

IV.

That Exhibit "A" attached hereto is a representative sample of the form of stock certificate issued by the Twin Falls Canal Company.

V.

That Exhibit "B" attached hereto is a representative sample of the form of contract issued by the Twin Falls Land & Water Company in selling water rights to settlers.

VI.

That Canyon View is the contract purchaser of certain water rights from

the Rockford Canal Company, said water rights being described as follows, to-wit:

a. 77.9 cfs or 3,894.95 miner's inches of the Natural Flow of the Snake River having a priority date of February 6, 1895, being a portion of that right decreed to the American Falls Canal and Power Company under the terms of the Decree entered in the case of Rexburg Irrigation Company, et al, vs. Teton Irrigation Canal Company, et al, by Judge J. M. Stevens, judge of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Fremont, dated December 16, 1910. (Also known as "The Rexburg Decree.")

b. 14.3 cfs or 716.7 miner's inches of the Flood Waters of the Snake River having a priority date of April 1, 1939, being a portion of that right decreed to the Aberdeen-Springfield Canal Company, in case of Aberdeen-Springfield Canal Company et al, by Judge Willard C. Burton, judge of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Fremont, dated March 12, 1969 (Also known as the "Supplemental Decree.")

c. 3,832.2 acre feet of storage space below elevation 6752 in Jackson Lake Reservoir, being a portion of the storage rights described in Contract No.

14-06-W-24 between the United States Department of the Interior and Aberdeen-Springfield Canal Company, dated October 22, 1952, and the contract amendatory and supplemental thereto, dated the 26th day of September, 1963.

d. 9,522.4 acre feet of storage space in Palisades Reservoir, being a portion of the storage rights described in Contract No. 14-06-W-24 between the United States Department of the Interior and Aberdeen-Springfield Canal Company, dated October 22, 1952, and the contract amendatory and supplemental thereto dated September 26, 1963.

e. 2,564.1425 acre feet of storage space in American Falls Reservoir, being a portion of the storage rights described in Contract No. 14-06-W-24 between the United States Department of the Interior and Aberdeen-Springfield Canal Company, dated october 22, 1952, and the contract amendatory and supplemental thereto, dated September 26, 1963; also being a portion of the storage rights described in Contract No. 14-06-W-59 between the United States Department of the Interior and American Falls Reservoir District, dated May 13, 1954, and the contract amendatory and supplemental thereto, dated March 14, 1960.

That the above sale has been approved by the Aberdeen-Springfield Canal Company, whose approval was necessary for the completion of said sale.

VII.

That Canyon View desires to apply said water to a beneficial use upon that following-described real estate situated in Twin Falls County and Owyhee County, Idaho, to-wit:

Township 8, South Range 12 E., B.M.: All of Sections 29; 32; and E 1/2, Sec. 30; E 1/2, Sec. 31; SW 1/4, Sec. 20; SW 1/4, Sec. 28; NW 1/4, Sec. 33.

Township 9, South Range 12 E., B.M.: All of Sections 4; 5; 10; 12; 14; 13; 23; 24; 25; 26; 34; 35; 36; and NW 1/4 and the S 1/2, Sec. 3; NE 1/4, Sec. 8; N 1/2, Sec. 9; N 1/2 SE 1/4, Sec. 15; NE 1/4, E 1/2 SE 1/4, Sec. 22; E 1/2, Sec. 27.

Township 10, South Range 12 E.,B.M.: All of Sections 1; 2; 3; 11 and 12; NE 1/4, Sec. 10; NE 1/4, Sec. 13, N 1/2 NW 1/4, Sec. 13, SE 1/4 NW 1/4, Sec. 13, NE 1/4 SW 1/4, Sec. 13, N 1/2 SE 1/4, Sec. 13 and the SE 1/4 SE 1/4, Sec. 13.

Township 9 South, Range 13 E.,B.M.: All of Sections 18; 17; 19; 20; 21; 28; 29; 30; 31; 32; 33; 34 and 35; SW

1/4, Sec. 7; W 1/2, Sec. 27; W 1/2 NE 1/4, Sec. 27; W 1/2 SE 1/4 Sec. 27; S 1/2, Sec. 16.

Township 10 South, Range 13 E.,B.M.: All of Sections 3; 4; 5; 6; 8; 9; and NE 1/4 NE 1/4, Sec. 7; N 1/2, Sec. 10; NW 1/4, Sec. 2; W 1/2 SW 1/4, Sec. 2; NW 1/4, N 1/2, Sec. 16; SW 1/4 NE 1/4, Sec. 16 and the NE 1/4, Sec. 17.

and any other lands susceptible of irrigation by said water in the general area of the above-described real estate. No part of the lands described above was part of the Carey Act segregation, or if so, such land was relinquished by the State of Idaho.

VIII.

That no natural water way exists by which Canyon View's water can be transported by gravity from the Snake River to its stockholders' land.

IX.

That Twin Falls Canal Company is a Carey Act operation company which operates a canal system in Cassia and Twin

Falls County, Idaho, which system was constructed by the Twin Falls Land and Water Company under a contract entered into on the 2nd day of January, 1903, by the State Board of Land Commissioners of the State of Idaho, and the Twin Falls Land and Water Company, a copy of said agreement is attached to the Amended Complaint. The water delivery system and water rights described in said contract by subsequent agreements were assigned to the Twin Falls Canal Company as contemplated by the parties at the time said contract was entered into.

X.

That the Twin Falls Canal Company, has pursuant to a resolution of its shareholders, refused to negotiate with Canyon View for the use of the Twin Falls Canal Company's canal system.

XI.

That the right of way was granted to

Twin Falls Land and Water Company at no cost by the State of Idaho for the construction and operation of canals and laterals. That the Twin Falls Canal Company canal system was constructed and paid for by the Twin Falls Canal Company or its shareholders and their predecessors in interest. That the canal system is operated at the expense of the Company and its shareholders. No income tax or real property taxes have been paid in the past by the Company on the system.

XII.

Plaintiff's plan is to use the diversion works of defendant at Milner Dam, including the dam itself, to divert water from the Snake River into the Main Canal. The water, a maximum of 300 cfs, would be conveyed in the Main Canal to the Highline Canal, down the Highline Canal to Lateral 1A and down Lateral 1A to its end. Milner Dam, the diversion

works, the Main Canal, the Highline Canal and Lateral 1A are existing facilities owned by the Canal Company, and in all areas would be used as a base, foundation or integral portion of the work proposed by plaintiff. See Exhibit "C" hereto.

Under plaintiff's plan, plaintiff or Twin Falls Canal Company would at plaintiff's expense, design and construct higher embankments, widen or deepen the canal and re-construct or re-locate existing facilities, where required to carry the additional water. In some areas, the necessary changes can probably be accomplished without doing any work outside the toes of the existing canal. In other areas, work outside the existing embankments may be required.

XIII.

The Court will have to regulate the time and method of the construction by plaintiff so that the construction does

not interfere with regular delivery of water by the Twin Falls Canal Company to its shareholders or other regular operations and maintenance work of the Canal Company. Plaintiff shall be obligated to take whatever steps might be necessary to avoid such interference without regard to the culpability of plaintiff for the reason or cause of the interference.

XIV.

If the Court determines that eminent domain is available to plaintiff, plaintiff's plan contemplates that after construction of the modifications to be constructed by plaintiff, those facilities would be operated by the Canal Company, by order of the Court in the condemnation action.

It would be necessary to determine the terms and conditions of the continuing relationship of the parties, including but not limited to an equitable

allocation of operation and maintenance expenses, responsbility for future capital improvements that might become necessary, mechanics for collecting or enforcing charges, allocation of transmission loss in various segments of the system, allocation of loss due to innocent or negligent mistake in the delivery of water, and indemnity responsibilities between the parties for seepage and other damage liability to third persons that might be beyond the scope or amount of insurance coverage, and the extent of insurance coverage that must be carried. Such terms and conditions shall be set by the Court if the parties cannot agree thereto before completion of the eminent domain proceeding.

The plan and method of operation should assure that the Twin Falls Canal Company shareholders shall not receive less water because of the enlargement of

the system and that their assessments for operation and maintenance shall not be increased because of eminent domain and enlargement.

XV.

There is no market for the facilities of the Twin Falls Canal Company proposed to be used by plaintiff, so no comparative market approach to value can be used.

Twin Falls Canal Comany is a non-profit corporation, and no value can be assigned to any of its facilities based on an income approach to value.

XVI.

By entering into this Stipulation defendants are not agreeing plaintiff has any right to condemn.

XVII.

The parties agree that:

a. Main Canal and Highline Canal are "main canals" as that term is used in the contract of 1903.

b. Lateral 1A is a "main lateral" as that term is used in the contract of 1903.

XVIII.

That the parties will submit briefs on the issues identified in paragraph XIX hereafter and the parties agree to submit evidence to the Court on any matters covered by this stipulation and any issues not covered by this stipulation which the Court deems necessary to reach its findings on these issues.

XIX.

The parties stipulate that the legal issues to be decided include the following:

a. Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physical system and compel operation thereby the Canal Company for both parties?

b. Does the Canyon View Irrigation Company, or its landowners, have any right as alleged beneficiaries of paragraph "First" and "Eleventh" of the 1903 Contract between defendants' predecessor and the Idaho State Board of Land Commissioners to become shareholders of the Twin Falls Canal Company?

c. As to the right of way of the Twin Falls Canal Company, what are its (1) nature, and (2) location.

d. What persons will be necessary and indispensable parties to a suit to be brought by the Canyon View Irrigation Company or its landowners to enforce rights it or they may have under the 1903 contract or by eminent domain against the Twin Falls Canal Company when said condemnation will not go out of the Twin Falls Canal Company's right-of-way.

e. 1. Would the implementation of plaintiff's proposal constitute a taking

of any property or property interests of Twin Falls Canal Company?

2. In the event a taking is found, what is the measure of damages to be applied?

Dated: May 10th, 1978.

HEPWORTH, NUNGESTER & FELTON

By: /s/ John C. Hepworth
Attorneys for Plaintiff

PARRY, ROBERTSON, DALY & LARSON

By: /s/ John A. Rosholt
Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation, Plaintiff, vs. TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY, Defendants.	Case No. 28301 OPINION

* * * * * * * * * * *

This opinion will be followed by Findings of Fact and Conclusions of Law. The case was submitted to the Court for decision upon a Stipulation of Facts and written agreements.

This opinion includes some facts not encompassed by the stipulation but which

are understood or agreed upon by way of agreed or unrefuted arguments.

By virtue of a 1903 contract (Exh. A, Second Amended Complaint) and assignments thereof to defendant, Twin Falls Canal Company (TFCC), there is and has been transported over an easement at least 3,000 cubic feet per second of irrigation water to beneficial use upon lands served by TFCC. This water is diverted from the Snake River at Milner Dam on the east into TFCC's Main Canal. The water then flows into TFCC's Low Line Canal (not pertinent here) and TFCC's High Line Canal. From the High Line Canal, the water flows into TFCC's Lateral A-1 to the end of the ditch system on the west. (See Exh. C, Stipulation of Facts.) The main Canal exceeds 17.5 miles in length; the High Line Canal, 39 miles; the Lateral A-1, 6.25 miles. (These distances were obtained by ruler measure-

ment of segments on Exh. C above mentioned. The measurements are not accurate and are on the low side because it is understood the water flows by gravity and necessarily flows erratic topographic contours.)

Canyon View Irrigation District (CV) owns 150 cfs of irrigation water and is negotiating the purchase of an additional 150 cfs. With this water CV desires to beneficially serve lands lying west of the TFCC canal system. CV's water would be diverted from the Snake River at Milner Dam and transported to the lands it proposes to serve. CV at the outset encountered two problems: (1) It has no canal system and (2) there is no natural waterway available for the transport of its water. So, its planning focused upon TFCC's canal system.

CV then offered its plan to TFCC which in general terms was as follows:

TFCC would permit CV to divert 300 cfs of water at Milner Dam into TFCC's canal system after CV enlarged and otherwise prepared the system at its own expense; CV would, in effect, trade its water for shares in TFCC, and would pay normal operation and maintenance assessments of TFCC; and TFCC would operate the enlarged system for the benefit of both parties. CV would then divert its water, or rather an amount of water equal to the amount of its water in the canal system, to a proposed canal running north and west from the west end of TFCC's Lateral A-1, and thence to the lands it hopes to serve. The proposed canal exceed 7 miles in legnth. (Same measuring process as above noted.) TFCC has consistently refused to negotiate upon the proposed plan and this lawsuit resulted.

By its lawsuit, CV seeks the following declaratory relief: (1) that CV, by

eminent domain, can condemn a right of way through TFCC's system; (2) that CV has the right under the 1903 contract to use that portion of the TFCC system for transporting its water to its shareholders' lands; (3) determining the TFCC right of way both as to measurement of width and whether it is held as an easement or in fee; (4) determining necessary and indispensable parties to a suit to be brought by CV to enforce its rights under the 1903 contract OR by eminent domain against TFCC when said condemnation will not go out of TFCC's right of way; (5) the measure of damages CV must pay TFCC and/or any land owner through which the canal flows where the CV's modification of the canal does not involve land outside TFCC's right of way; and (6) for other and further relief as seems just and proper.

By their Stipulation of Facts the parties have agreed the following are issues to decide in this case: (See Par. XIX.)

1. Does CV have the right of eminent domain to condemn into a portion of TFCC's physical system and compel operation thereof by TFCC for both parties?

2. Does CV, or its landowners have any right as alleged beneficiaries of paragraphs "First" and "Eleventh" of the 1903 contract between TFCC's predecessor and the Idaho State Board of Land Commissioners to become shareholders of TFCC?

3. What are the nature and location of the TFCC right of way?

4. What persons will be necessary and indispensable parties to a suit brought by CV or its landowners to enforce rights it or they may have under the 1903 contract or by eminent domain

against TFCC when such condemnation will not go out of the TFCC right of way?

5. a. Would the implementation of CV's proposal constitute a taking of property or property interests of TFCC?

b. If a taking is found, what is the measure of damages to be applied?

I.

DOES CV HAVE THE RIGHT OF EMINENT DOMAIN TO CONDEMN INTO A PORTION OF TFCC'S PHYSICAL SYSTEM AND COMPEL OPERATION THEREOF BY TFCC FOR BOTH PARTIES?

At the outset, it is noted that CV does not propose merely to condemn land or easement of TFCC upon or over which to construct its own canal system. It proposes to enlarge TFCC's conduits and compel TFCC to operate the enlarged system for both parties. In this endeavor CV seems to rely upon Idaho Code Sections 42-105, 42-1102, 42-1104, and 42-1106.

Section 42-105, I.C., deals with the exchange of water. The thrust of this

section relates to "any natural channel or waterway" and "the stream, creek or river into which such water flows." The legislative use of the word "ditch" in connection with the words "natural channel or waterway" without qualifying language is unfortunate. I can find no language in the section which indicates a legislative intent that a water owner may turn his water, willy-nilly, into the artificial canals of another and withdraw a like amount down stream, thus effecting an exchange. Commingling of waters necessarily results in an exchange because one cannot take out precisely the water put in. I am of the opinion Section 42-105 does not apply to exchanges in artificial conduits. Even so, the agreements required by that section are lacking in this case.

Section 42-1104, I.C., deals with rights of way over state lands and therefore has no application in this case.

Section 42-1102, I.C., provides that landowners remote from a stream are "entitled to a right of way through the lands of others for the purposes of irrigation." It does not say they are entitled to use another's existing water conduit system. This section does not say how the entitlement is implemented. However, Section 42-1106, I.C., says the remote landowners may proceed as in the law of eminent domain (Sections 7-701 et seq., I.C.).

Section 7-702, I.C., identifies the interests in land which a condemnor may acquire by eminent domain. Subparagraph 1 is eliminated because TFCC does not have a fee simple title, as will be discussed later. Subparagraph 3 is wholly inapplicable to this case. That leaves, for this case, subparagraph 2: An easement when taken for any other use (other than uses in subpar. 1). It is

possible, therefore, for CV to acquire an easement in TFCC's right of way. But to do so we must examine some of the facets involved in the accomplishment.

Can CV accomplish its proposed public use - transporting water to the places of beneficial use - by the acquisition merely of an easement from TFCC? This issue requires consideration of what rights CV needs to acquire and of the rights of an easement owner under property law.

The physical impossibility of separately maintaining and operating the physical system for CV water as distinguished from TFCC water is readily apparent. In such an extensive water transportation and delivery system, unified management would be essential with the operating entity billing the other for a part of the total cost of operation and maintenance. What CV needs

to acquire is either (1) the right for it to operate the enlarged system for the benefit of both parties or (2) the right to compel TFCC to operate the enlarged system for the benefit of both parties. Alternative (1), above, does not seem reasonable in that the owners of 300 cfs would also control TFCC's 3,000 cfs, very likely exposing TFCC to numerous risks not now present.

CV actually needs to acquire three types of property rights against TFCC: (1) a right to enlarge and use the TFCC right of way and physical system therein; (2) a right to compel TFCC to operate and maintain the enlarged system for its benefit as well as TFCC's own benefit; and (3) a right to exchange water with TFCC. If Section 7-702, I.C., authorizes CV to acquire an easement from TFCC by eminent domain, the issue then arises: Will that acquisition give CV all three of the above-mentioned rights?

If CV acquires an easement in the TFCC system for the transportation of water, it is my impression of the law that the duty to maintain and operate that easement for the delivery of its water is CV's, not TFCC's. (See Restatement of property, Sections 450, 451, and 452; Gibbens v. Weisshaupt, 98 ID 633, 570 P. 2d 870, 877.) Neither the right to compel maintenance and operation nor the right to exchange water would come within the accepted understanding of an easement. Acquisition of an easement would give CV a right to use TFCC's right of way and structures thereon. It would not, however, give CV the right to require TFCC to do affirmative acts to maintain and operate the system for CV's benefit or to exchange water with CV.

At this point, we should take a look at Section 7-703, I.C., in connection with Section 7-702, I.C. Section 7-702

defines the kind of interests in land which a condemnor may acquire by eminent domain, namely, among others, an easement. The focus of Section 7-702 is on the condemnor, i.e., what may the condemnor acquire. Section 7-703, in contrast, defines the kind of property interests of a condemnee which are subject to the eminent domain power. The focus is on the condemnee, i.e., what may be taken from the condemnee. Under Section 7-703(5) a right of way of the condemnee and structures and improvements thereon may be subjected to a "limited use, in common." This defines not what the condemnor may acquire (Section 7-702 does that) but what the condemnee may lose, namely, the exclusive use of the right of way. It is clear that CV cannot acquire under Section 7-703 what section 7-702 fails to give it the power to acquire, namely a right in TFCC's ease-

ment whereby TFCC is obligated to maintain and operate the physical system for the benefit of CV or is subject to an exchange of water.

When property is already devoted to public use, a condemnor may proceed under 7-703(3) if his proposed use is a more necessary public use. Under 7-703(5) the condemnor's use need not be a more necessary public use than the condemnee's, but the condemnor's limited use in common may not materially interfere with the condemnee's use. Material interference is allowed only in accordance with (3), i.e., where the condemnor's use is a more necessary public use than the condemnee's. Even if CV were empowered to acquire by eminent domain not only an easement but also a right to compel personal services by TFCC and a water exchange right, that power could be exercised only if either (1) the taking

is for a more necessary public use (subpar. 3), or (2) the taking is for a limited use in common which will not materially interfere with TFCC's public use (subpar. 5).

Would CV's taking be for a more necessary public use? TFCC uses its right of way for the purpose of conveying irrigation water to places of beneficial use. CV seeks to exercise the power of eminent domain for the same public use. CV does not hav a more necessary public use. Compare a line of cases illustrated by Southern Pac. R.R. v. Southern Cal. Ry., 111 Cal. 221, 43 P. 602. There, condemnation of unused portion of railway right of way for laying of a parallel track system was permitted. But here we have the proposal to use the used portion of water right of way in which to commingle waters under separate ownership. In such case, material interference is

obvious. For the most part, the railway cases are distinguishable from the water-course cases. The railway cases deal with parallel uses and such things as crossings where, in either case, interference, if any, is minimal. Furthermore, the use of unused right of way necessarily is a greater public use.

There is a sense in which CV seeks to condemn unused capacity of the TFCC right of way, but CV cannot thereby claim a more necessary public use unless it also shows that the taking would not involve material curtailment of TFCC's rights and privileges. So, in the final analysis the matter comes down to Section 7-703(5) and the question of whether there would be material interference with TFCC's public use.

In applying the material interference test in the present case, Paragraph XIV of the Stipulation of Facts provides a

convenient check list of some of the potential trouble points associated with unitary operation of a single physical system in which two entities have an interest. They need not be detailed here.

In view of the past inability of the parties to negotiate an agreement regarding the CV Proposal (see Stipulation of Facts, Par. X), in the event of condemnation this court would have to work out the continuing relationship problems in its decree. (See Par. XIV, Stipulation.) It is doubtful this could be done in such a way as to assure that there will be no material interference with TFCC's existing public use. Furthermore, the court's management could well be virtually endless. (Note: ISU Archaeologist, B. Robert Butler, in his book, A Guide to Understanding Idaho Archaeology, 3d Ed., points out that Southern Idaho water is steadily diminishing and will completely

run out within 3,000 years, turning the land into a desert. Presumably TFCC and CV would, in the event of condemnation in this case, last as long as the water!

The potential problems will be great even if TFCC can be expected to put up with minor inconvenience and is protected only against material interference with its present situation. If the addition of CV water to the system increases pressure at the base of the canal, maintenance expenses to assure canal bank safety will increase and there will be a greater likelihood of need for capital improvements. These expenses would have to be allocated so that TFCC's costs would not be materially increased because of the enlargement. There is no guarantee that an allocation based on percentage of irrigated acreage or water in the system would accomplish that; it would be pure accident if it did. In the

event of canal breakage, the res ipsa loquitor rule of Brizendine v. Nampa & Meridian Irr. Dist., 97 ID 580, 548 P. 2d 80, may apply. It has been suggested that the result approaches strict liability. (See 13 Idaho Law Review 427.) TFCC, as the operating entity and the larger of the two entities, may well end up paying a judgment for damage from the breakage to the extent of lack of insurance coverage. Even if it has indemnity rights against CV, there is no way to assure that TFCC will not end up worse off than if there had been no canal enlargement. How should the insurance premium be allocated if it increases due to breakage or risk thereof from the added increment of CV water?

Similarly, the allocation of transmission loss between the parties poses difficulty in protecting TFCC. Suppose for the sake of example that CV's 300 cfs

is 10% of the water in the TFCC system near its beginning at Milner Dam. By the time the water reaches the end of the TFCC system there will have been numerous diversions by TFCC and the percentage of water each party in the system will constantly change. The allocation of evaporation and canal bank losses should vary between the parties accordingly. Furthermore, the proper allocation may vary from time to time depending upon air temperature, wind velocity, humidity, and canal bank condition.

If TFCC is the operating entity very likely it will face the additional risk that CV will at some point in time claim damages for mismanagement in the operation of the system for its benefit. (We again note that the parties never have talked and are not now talking about the proposed relationship between them.) This is a risk which could be voluntarily

assumed by contract but which should not be imposed by force of law. The Court knows of no way to compensate TFCC at the time of condemnation for its exposure to these risks. In fact, most of the above difficulties involve risks of material interference with TFCC's existing operation which, because of their contingent nature, might not be compensable in an eminent domain proceeding.

In considering further the material interference limitation of Section 7-703(5), I.C., see Section 61-514, I.C., which deals with joint use of public utility facilities. Also, see definition of "irreparable injury," Black's Law Dictionary (4th Ed., 1951). TFCC is analogous to a public utility. Section 61-514, I.C., states sound policy which ought to weigh heavily in any effort to give meaning to the material interference limitation inherent in Section 7-703(5), I.C.

True, we have been talking about contingencies and perhaps speculation. The question is, however, at which point can a court adequately protect?

The power of eminent domain to compel the rendition of personal services, as would be involved in maintenance and operation for the benefit of CV, is rather unusual in American law. Since the power of eminent domain ordinarily does not include a power to compel the rendition of services to the condemnor by the condemnee, such a power ought not to be lightly implied and should exist only when a statute explicitly provides for it, or provides for it by necessary and compelling implication, or perhaps when it is provided for by express or implied agreement.

CV relies heavily upon Portneuf Irr. Co. v. Budge (Portneuf I), 16 ID 116, 100 P. 1046, in arguing that ultimately it

would be entitled to condemn into the TFCC system. My reading of the case does not so indicate to me. The case should be read for issues decided, arguments made and arguments not made, and for issues not presented. The holding of this case should be confined to the facts presented. There is no basis for saying that Portneuf I decided, even by implication, that a small condemnor can acquire from a much larger condemnee, under Section 7-702 or any other Idaho statute, not only an easement but also a right to compel the condemnee to operate and maintain the enlarged system for the benefit of the condemnor.

Upon the return of the Portneuf case to the trial court, condemnation was allowed. There was then another appeal regarding the correctness of a jury instruction on the measure of damages. Portneuf - Marsh Valley Irr. Co. v.

Portneuf Irr. Co. (Portneuf II) 19 ID 483, 114 P. 19. That was the only question raised in Portneuf II. Thus the Idaho Supreme Court has never passed upon the issues now raised by TFCC, and neither Portneuf I nor Portneuf II is of any assistance to CV in regard to these issues.

The most significant Idaho case with reference to CV's condemnation effort is Berg v. Twin Falls Canal Co., 36 ID 62, 213 P. 694, involving an unsuccessful effort to condemn into the TFCC system. The court held the plaintiffs could not condemn the right they sought. The court's rationale sheds light on the current status of Portneuf I in the Idaho law:

> "Appellants say the purpose of their plan is to beneficially use waters subject to appropriation. But how do they propose to accomplish this? Solely through a novel use of a canal system belonging to others. Appellants could condemn a right to use a portion of the system of respondent,

if necessary, to convey water appropriated by them to land upon which it was to be used. (Citing Portneuf I, supra.) They could mix waters appropriated by them with those of respondent and any number of others, in a natural watercourse for a similar purpose. But this practice is allowed upon the theory that the water taken out is the water appropriated (emphasis supplied). No legal fiction can support the theory that the water to be taken out of respondent's main canal is the same water as that proposed to be appropriated by appellants and placed in the Low Line Canal. It is true that in one case cited by appellants, viz., Reno v. Richards, 32 ID 1, 178 Pac. 81, the taking of water was permitted out of a stream, above the place where an equal amount of salvaged water was returned through another stream, all above the points of diversion of lower appropriators. But in that case the compensation was accomplished through natural watercourses, without the slightest use of, or interference with, any system of the lower appropriators. The water was not diverted from the canal of another party."

Thus, the Supreme Court distinguished and limited Portneuf I on the ground that it did not involve an exchange of water in the artificial canal system of the condemnee. The distinction is questionable since the court virtually acknow-

ledged the legal fiction involved in saying that the condemnor in Portneuf I would be taking out of the system the same molecules of water that it put in rather than working an exchange. The court could have overruled Portneuf I; instead it distinguished that case by indulging in the fiction that the water taken out was the water appropriated in Portneuf I, but refusing to apply the same fiction to the different facts in Berg. The court's treatment of Portneuf I indicates that although that case is not overruled, it is not to be extended beyond its particular facts.

Berg stands for the proposition that condemnation into an existing canal system must be denied when the condemnor's purpose cannot be accomplished merely by the taking of an easement but requires the acquisition by the condemnor of an additional right or rights. It has

been demonstrated, supra, that CV's purpose cannot be accomplished merely by the taking of an easement. It must also acquire the right to compel TFCC to maintain and operate the enlarged system for its benefit. On this ground along Berg requires denial of CV's eminent domain attempt. Furthermore, the proposal of CV cannot be accomplished without acquiring the right to exchange water. There is no room in modern jurisprudence for the fiction that CV could take out of the TFCC system the same molecules of water it puts in.

27 AM. JUR. 2d, Eminent Domain, Section 404, tells us it is obvious that if property is taken in the ostensible behalf of a public improvement which it can never by any possibility service, it is taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. Since

CV's proposed public use of transporting irrigation water to the places of beneficial public use requires for its accomplishment the acquisition not only of an easement but also rights to compel operation by TFCC for the benefit of CV and to exchange water with TFCC, and since CV clearly lacks power to acquire either of these latter rights by eminent domain, the taking of the easement alone would not serve a public use. Section 7-704, I.C., requires the taking to be "necessary" to CV's public use. Absent public use, the question of necessity is not before us.

(REMAINDER OF OPINION OMITTED)

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation, Plaintiff and Appellant, vs. TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY, Defendants and Respondents.	Supreme Court No. 13174 PETITION FOR RE-HEARING

* * * * * * * * * * *

COME NOW Respondents and petition the Court to grant a re-hearing in the above-captioned case.

I. THE COURT DID NOT DECIDE THE BASIC ISSUE PRESENTED TO IT.

The stipulation, which formed the foundation for the case in the Court below, and in this Court, states:

> "If the Court determines that eminent domain is available to plaintiff, plaintiff's plan contemplates that after construction of the modifications to be constructed by plaintiff, those facilities would be operated by the Canal Company, by order of the Court in the condemnation action. (R. p. 97, ll. 8-12)

The parties also stipulated the issues to be decided. Issue a. was agreed to be:

> "a. Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physical system and compel operation thereof by the Canal Company for both parties?"

The key issue stipulated by the parties, briefed by the parties, and argued by the parties was whether CV could condemn into TFCC's system, enlarge it, and then compel operation of the enlarged system by TFCC. The Court's decision indicates that CV probably

cannot compel operation of the enlarged system, but holds that joint operation and maintenance is the way to go.

The Court's opinion states:

> "Perhaps it is true that CV cannot compel TFCC to operate and maintain the canal on its behalf. But if that fact alone prevented CV from acquiring concurrent ownership in the right of way, the condemnation of rights of way in common with existing owners would be all but impossible." (pp. 9-10 of Opinion)

The Court goes on to hold:

(a) no operation and maintenance is required, and

(b) the parties can do it jointly.

At page 10, the Court states:

> "Basically, we view the post-condemnation relationship of CV and TFCC as a species of co-tenancy or tenancy in common. See Moss v. Rose, 41 P. 666 (ore. 1895); 4 Water Rights § 341.2 (1970). Both parties have the right to the use of the canal right of way; neither can exclude the other. See, e.g., In re Randall's Estate, 64 Idaho 629, 132 P.2d 763 (1943). Other than introducing CV's 300 cfs of water into the enlarged canal at the point of diversion, there would be nothing for TFCC to do. The record indicates that CV will remove its water, less any transmission

loss, at the end of TFCC's canal. Removal of the water will be CV's problem. If TFCC ever ceases to operate the canal for its own needs, then CV as a co-tenant will have to assume that responsibility. The party who undertakes to operate the canal is entitled to a pro-rata contribution for operation and maintenance costs. I.C. § 42-1206; 3 Kinney on Irrigation & Water Rights § 1457 (2d ed. 1912). See also Cal. Water Code § 1782 (West); N.M.Stat. Ann. § 75-5-15; Utah Code Ann. § 73-1-7. As easement co-tenants, both TFCC and CV would have a duty to the owners of the servient estate, i.e., the adjacent landowners, to maintain and repair the right of way. Gibbens v. Weisshaupt, 98 Idaho 633, 570 P.2d 870 (1977); Rehwalt v. American Falls Reservoir Dist. No. 2, 97 Idaho 634, 550 P.2d 137 (1976); Suitts v. McMurtrey, 97 Idaho 416, 546 P.2d 62 (1976)."

At page 13, it sums up:

"We therefore conclude that CV can condemn a right to use a portion of the canal company in common with TFCC; . . ."

The Court's statements lead to the conclusion that the Court is holding that joint operation and maintenance is the answer, even though that was not the question, and even though the parties did not propose or discuss it.

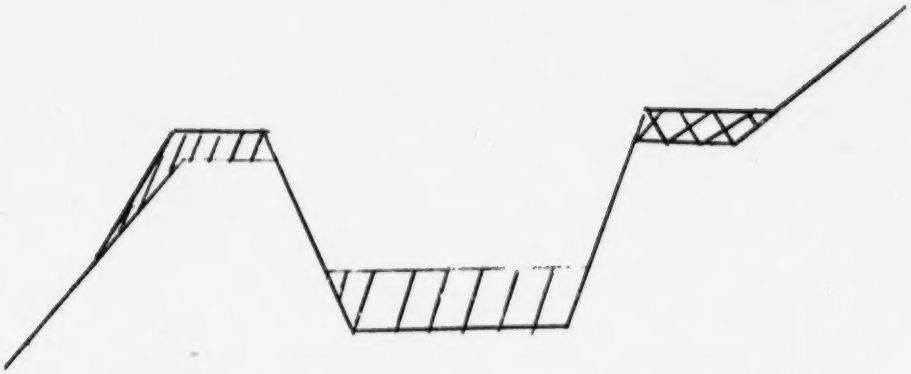
II. CV'S PLAN WOULD REQUIRE ADDITIONAL OPERATION AND MAINTENANCE.

The Court's decision is based on an incorrect understanding of the operation and maintenance of a canal system. The Court says:

> "Other than introducing CV"s 300 cfs of water into the enlarged canal at the point of diversion, there would be nothing for TFCC to do."

Unfortunately, gravity is the only component part of the system which operates by itself. Rodents, moss and weeds need to be controlled, on a regular basis. Rip-rap and reinforcement of banks are continuing operations. Apparently the Court believes that Canyon View will operate and maintain portions of the system which it constructs, and TFCC will have nothing to do with the changes made by CV.

Assume the enlarged canal looks like this in cross-section, with the cross-hatched area being added or changed by CV:



Is Canyon View responsible for rodent and weed control in the area which it added? Is CV responsible for leaks in the bottom, since it deepened the canal? If a headgate has to be raised to deliver to a TFCC delivery point because of the higher water level, whose headgate is it?

If CV is to use the enlarged system "in common" with TFCC, there are a number of operating considerations. The place where CV would remove its water is not the end of TFCC's system. CV's operation would cause fluctuations in delivery to stockholders below the removal point, to the detriment of TFCC's ability to serve it stockholders.

If CV desires to turn on its water earlier in the spring than does TFCC, is TFCC required to alter its maintenance schedule to meet CV's date? If CV desires to run water in the winter, is TFCC required to suffer the problems and exposure to liability and system damage that accompanies cold weather operation?

The Court has decided, with no basis in the record, that joint operation is possible. This poses problems for the parties later, since joint operation poses major problems, and joint operation is probably not feasible, in spite of the Court's statements to the contrary. If CV wishes to change its proposal, to include joint operation, TFCC is entitled to present the facts that bear on that question without the hindrance of dicta in the Opinion of this Court. The Court noted at page 16 that the parties "did not attempt to construct an exhaustive

record." The reason for the slender record is that the parties only stipulated enough facts to allow resolution of certain agreed issues. The record was not intended to be the basis of resolution.

III THE COURT'S OPINION WOULD PERMIT AN UNCONSTITUTIONAL TAKING OF TFCC'S PROPERTY WITHOUT DUE PROCESS.

The Court describes the relationship between TFCC and CV after the condemnation as "a species of co-tenancy or tenancy in common." (p. 10) Yet the Court also holds that TFCC is not entitled to compensation for the taking of its right in the real property, but only for loss of exclusive use of the interest in real property. If CV is to be a 10% owner of the diversion works, for example, shouldn't it pay something for the works?

To place the problem in perspective with more classic condemnation problems, if a highway district is condemning an easement for a roadway, it pays for the value of the land actually occupied, and for damage to the remainder caused by the severance. Under the Court's analysis, all the property owner is losing is the right of exclusive use of the easement area, since he retains the fee. Under this approach, a migrant labor housing authority could condemn one room of an existing house, since the owner is not losing anything but the exclusive use of the premises.

However, the loss of exclusive use means more than having CV's water in the canal. The Court's opinion requires TFCC to operate its system for the benefit of 15,000 to 20,000 additional acres, with the attendant additional liability to those landowners, and to third persons

exposed to additional hazard because of increased volume of water. The Court feels free to impose this potential liability over the protests of TFCC, saying:

> "If proven, that increase in exposure is compensable, and may manifest itself in the form of increased insurance premiums." (p. 17)

The Court has assumed, but cannot decide, that all risks resulting from having CV's landowners dependent on TFCC's system can be guarded against by insurance. A corollary but likewise unstated assumption is that such "coverall" insurance is available. It is an unsound doctrine to use judicial fiat to impose unwanted liability on the assumption that the liability can be insured against.

Further, the parties themselves agreed that there could be additional exposure which could not be insured against:

> "It would be necessary to determine the terms and conditions of the continuing relationship of the parties including but not limited to . . . indemnity responsibilities between the parties for seepage and other damage liability to third persons that might be beyond the scope or amount of insurance coverage, . . ." (Stipulation of Facts, p. 6, ll 22-23, R. p. 97)

The Court says, p. 8, that increased risks "are more properly considered as elements of compensation." The Court has avoided the basic issue, which is whether eminent domain is a proper vehicle to impose risk at all. Eminent domain usually takes something; access, right of way, right of development or right of use. The taker then uses the property rights for its own purposes, but with risks attendant upon that use being borne by the taker. The Court's opinion is noticeably devoid of authority for the proposition that eminent domain can be used to impose risks incident to the

taker's operations on the owner of the property subject to condemnation.

It is apparent that CV's proposal to have TFCC operate and maintain the enlarged system was not a slip of the pen, since a system of mutual operation and maintenance could not work. In any event, this Court should take the case as it finds it, and not restructure it to better fit a rule of law applicable to other situations.

CONCLUSION

TFCC asks this Court to grant this Petition for Rehearing, and thereafter to decide the issues presented, leaving other issues to be decided in appropriate cases.

DATED this 29th day of September, 1980.

NELSON, ROSHOLT, ROBERTSON,
WALKER, TOLMAN & TUCKER

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation, Plaintiff and Appellant, vs. TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY, Defendants and Respondents.	Supreme Court No. 13174 BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR RE-HEARING

* * * * * * * * * * *

COME NOW Respondents and file this brief in support of their petition to the Court to grant a re-hearing in the above-captioned case.

I. THE COURT DID NOT DECIDE THE BASIC ISSUE PRESENTED TO IT.

A. Joint Operation and Maintenance was not an Issue.

The Stipulation of Facts, which formed the foundation of the case in the court below, and in this Court, states:

> "If the court determines that eminent domain is available to the plaintiff, plaintiff's plan contemplates that after construction of the modifications to be constructed by plaintiff, those facilities would be operated by the Canal Company (TFCC) by order of the court in the condemnation action." (R. p. 97, ll. 8-12)

The parties to the litigation also stipulated the particular issues to be decided by the lower court. The first issue was as follows:

> "a. Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physical system and compel operation thereof by the Canal Company for both parties?" (R. p. 98, ll. 27-30) (Emphasis supplied)

The briefs submitted to the lower court and to the appellate court, along with the respective arguments, conformed to the above-referenced stipulation and

concentrated on the defined issue of whether or not CV could condemn into TFCC's system, enlarge it, and then compel operation of the enlarged system by TFCC. The lower court concentrated upon this issue, holding that condemnation or the power of eminent domain was not the proper vehicle with which to compel the rendering of services by one party to another.

The opinion of the Supreme Court in this case inferentially holds that CV cannot compel operation of the enlarged system by TFCC for its benefit, but then the Court deviates from the precise issue presented for its consideration by proposing a relationship of "concurrent ownership" and a concurrent right to operate. The statements of the Court evidencing this modified relationship are contained in the following excerpts from the opinion:

"Perhaps it is true that CV cannot compel TFCC to operate and maintain the canal on its behalf. But if that fact alone prevented CV from acquiring concurrent ownership in the right of way, the condemnation of rights of way in common with existing owners would be all but impossible." (pp. 9-10 of Opinion)

"Basically, we view the post condemnation relationship of CV and TFCC as a species of co-tenancy or tenancy in common. . . . Both parties have the right to the use of the canal right of way; neither can exclude the other. . . . Other than introducing CV's 300 c/f/s of water into the enlarged canal at the point of diversion, there would be nothing for TFCC to do. . . . If TFCC ever ceases to operate the canal for its own needs, then CV as a co-tenant will have to assume that responsibility. The party who undertakes to operate the canal is entitled to a pro rata contribution for operation and maintenance costs." (p. 10 of the Opinion)

"We therefore conclude that CV can condemn a right to use a portion of the Canal Company in common with TFCC; . . ." (p. 13 of the Opinion)

Clearly, the opinion of the Court goes beyond the scope of the issues presented to the trial court below and consequently beyond the scope of the appellate review which should have been followed in this instance.

B. Necessity Was Not An Issue.

As pointed out above, the issues to be decided were specifically and carefully set out by the parties. The issue of the necessity of the specific use contemplated was not stated as an issue.

Under § 7-704, Idaho Code, the prerequisite facts to be found are:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the pubic use to which it is to be applied is a more necessary public use.

The Court's opinion decides the issue of necessity, intermixed with discussion of defeat or impairment of TFCC's existing use. At pages 8-9, the Court said:

> "There is nothing in the record to suggest that a competently engineered

enlargement of a portion of TFCC's canal system designed to accommodate an extra 300 cfs of water would render it unable to deliver water to its shareholders.

"Since the record does not suggest that CV's enlargement and common use would displace, defeat or seriously impair TFCC's already existing public use of the canal system, CV need not establish a "more necessary public use. (Citations omitted)

"As previously mentioned, only a showing of reasonable necessity is required. We think the record supports that showing.

"The parties stipulated that 'no natural waterway exists by which Canyon View's water can be transported by gravity from the Snake River to its stockholders land.' It seems clear that this fact, when considered in conjunction with excessive cost of constructing a parallel canal system would satisfy the necessity requirement."

The Court bases its decision on necessity on lack of contrary showings in the record, yet the record was designed to permit a decision on the basic issue of right to condemn, not necessity. The Court's reliance on the slender record to support its decision on issues not

presented by the parties is an example of circular reasoning, and illustrative of the wisdom of deciding only issues presented for consideration.

A judicial review of the necessity issue is required by statute, and TFCC has a right to that determonation based on a record made in a proceeding in which necessity is an issue. Since the record here does not contain any information as to Canyon View's proposal, TFCC suggests the following example for illustration:

Assume that CV's enlargement will cost $3 million, and a new canal could cost CV $10 million. Further assume that it would be possible to assess damages to TFCC at $6 million. Then the question would become whether it was reasonably necessary to damage TFCC in the amount of $5 million to save $1 million to CV. The above hypothetical fact situation also raises the issue of whether $6 million in

damages to TFCC is not a "serious" interference with its ability to deliver water to its shareholders. This sort of analysis is indispensable to a discussion of necessity, but is not possible on the record before the Court.

The Court's opinion would prevent TFCC from contesting the necessity issue, and prevent a meaningful judicial decision on that issue from being possible.

C. Appellate Review May Only Address Those Issues Presented Below.

This Court has been faced on numerous occasions with efforts by litigants to present issues and theories of law during the appellate review process that were not presented in the lower court. The circumstances at hand are a reversal of the factual scenarios in those cases, and yet the following excerpts from previous decisions of this Court are applicable to both situations:

"On appeal, the Supreme Court is prohibited from basing its decision on any facts or circumstances not before the court below or not included in the record." Fisher vs. Fisher, 443 P.2d 463, 92 Idaho 379, Neer vs. Safeway Stores, Inc., 442 P.2d 771, 92 Idaho 361.

"The case having been submitted to the trial court on the issues presented by the parties as embodied in their pleadings and their pre-trial order, a theory presented for the first time on appeal will not be reviewed." Earl vs. Fordice, 374 P.2d 713, 84 Idaho 542. See also Goggins vs. Herndon, 249 P.2d 203, 73 Idaho 169 (1952)

The purpose behind the above rule was aptly stated by the Supreme Court of California, sitting In Bank, in Ward vs. Taggart, 336 P.2d 534, 51 Cal.2d 736:

"The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that contemplates a factual situation the consequences of which are open to controversy and which were not put in issue or presented at the trial." 336 P.2d, at page 537

Clearly, had the issues of joint operation, maintenance, or necessity been

proposed by CV below, TFCC would have had the opportunity to present facts to the lower court, which might have been reviewed by the appellate court, which would have highlighted the inadequacies of such a proposal and might also have presented law to the court in direct opposition to such a contention. However, in light of the stipulation presented to the lower court, which fixed the issues to be determined, such facts and legal analysis were not presumed to be necessary.

D. A Stipulation Limiting The Issues Binds Both The Trial And Appellate Courts.

It is well recognized that the court, as well as the litigants, is bound by a stipulation fixing issues and is without power to go beyond that stipulation and to undertake to pass on or to submit issues which have been withdrawn or excluded from its consideration. C.J.S.

Volume 83, Stipulations, Section 22, page 46. This court has recognized the binding effect of stipulations upon the parties, Call vs. Marler, 403 P.2d 588, 89 Idaho 120, but other courts have gone a step further and voiced a recognition of the binding effect of a stipulation upon the court itself. In Kitterman vs. Eagle Pine Company, 257 Pac. 815, the Supreme Court of Oregon was called upon to resolve a controversy concerning a contract to purchase a quantity of lumber. The action in the lower court was brought by the seller for monies due on a contract to purchase lumber which was to be shipped FOB, Grant's Pass, Oregon. Prior to trial, the parties stipulated that the sole function of the court would be to decide where inspection of the quantity of lumber should have taken place, i.e., at the shipping point, at the delivery point or the final

destination. Depending upon where the court decided inspection was required, judgment was then to be entered in accordance with the agreements contained in the stipulation itself. The lower court entered judgment for the seller and the purchaser appealed. The Supreme Court of Oregon initially held that the purchaser had no duty to inspect the lumber until it reached its final destination and reversed the lower court in that respect. However, the lower court had gone a step further and found that there was no breach of warranty by the seller upon the facts presented to it, despite the fact that that was not a issue outlined in the stipulation of the parties. With regard to this issue, the Supreme Court said:

> "The finding of the trial court that there was no breach of warranty is irrelevant under the issues as submitted by the stipulation . . . While we would prefer to decide this case upon its merits, courts are not

permitted to go beyond the stipulation of the parties." 257 Pac. at page 818

Clearly, both the trial court and the appellate court are bound by the stipulations and agreements entered into among the litigants prior to presentation of the cause for consideration.

> "Where litigants submit a cause on agreed facts, such agreed facts constitute the sole basis for the judgment rendered thereon, hence the judgment must be tested on the basis of those agreed facts. . . . Where parties stipulate as to the issues to be tried, the pleadings become immaterial . . . If the trial court's finding is contrary to a deliberate stipulation, it must fall." Wolf Corporation vs. Louis, et al., 11 Ariz. Appeals 352, 464 P.2d 672, at page 675 (Emphasis supplied)
>
> See also Taylor vs. Murray, Supreme Court of Utah, 232 P.2d 367.

The fact that sufficient facts may be before the court from which it might extrapolate or expand upon the issues actually presented for its consideration does not justify such an exercise in the face of specific limitations placed upon

the issues by the litigants. The case of Trafton vs. Youngblood, 69 Calif. Rpts. 568, 442 P.2d 648, a 1968 California case in which the Supreme Court of California was sitting In Bank, illustrates this proposition. The initial action was brought by a client against his attorney for the recovery of monies paid by the attorney to himself out of funds held in escrow, the money apparently used to cover attorney's fees which were due and owing as a result of services rendered. Although the case contains numerous issues, the parties stipulated prior to trial that the reasonableness of the attorney's fees was not an issue before the court. On appeal, the attorney attempted to direct the attention of the appellate court to testimony whereby the court could determine the reasonable value of the services provided even though the trial court had denied a tardy

motion to amend to include the issue. This testimony apparently had been submitted to the lower court in support of other issues which were properly before the court. The Supreme Court of California responded:

> "Actually, on this mere fortuity, defendant attempts to inject a new issue into the case under the guise of an amendment to conform to the proof. As we said in another context in Riverside Water Company vs. Gauge, (1895) 1098 Calif. 240, 41 Pac. 299:
>
> > 'It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court, the evidence must be limited to the actual issue. . . The court would not be authorized to consider it as establishing an issue that was not before it for trial.' 442 P.2d at page 658

The Court comments on page 16 of the Opinion in this case that the parties

"did not attempt to construct an exhaustive record" in the lower court. The reason for the slender record is obvious from the above; stated simply, the parties limited the issues to be resolved and presented only those facts to the lower court which bear directly upon those issues. The record was not intended to, nor can it be said that it does, support the various factual findings and conclusions made by the appellate court in this instance. The most striking examples of this are the court's conclusion that joint operation of the canal system is possible and that any increased risks or liabilities of TFCC may be guarded against by a simple increase in insurance coverage. No facts may be gleaned from any portion of the record which can even arguably support these conclusions.

E. The Court's Findings May Not Be Based Upon Judicial Notice.

It cannot be successfuly contended that the appellate court may judicially recognize sufficient facts upon which to base the conclusions contained in the opinion. Idaho Code § 9-101, et. seq., sets forth the legislative basis for "Judicial Knowledge." Although this court has held in the City of Lewiston vs. Frary, 91 Idaho 322, 420 P.2d 805 (1966) that the referenced statute is not exclusive and is not one of limitation, it certainly provides no basis for any of the conclusions reached by the Court relative to the joint operation and availability of insurance coverage. In addition to facts judicially recognized by virtue of § 9-101 the Courts of Idaho have taken judicial notice of matters of "common knowledge", this court having sanctioned, and in fact directed, such evidentiary short cuts.

> "Public officers and courts should not disclaim knowledge of what

everybody else knows." City of Twin Falls vs. Koehler, 63 Idaho 562, 123 P.2d 715 (1942)

The phrase "common knowledge" has not specifically been defined in Idaho, although Koehler, supra, implies that "everybody" must have the knowledge before the court is justified in judicially recognizing it. Such a construction may be too broad and yet the court is not without bounds in determining what is commonly known. Other states have considered the scope of the phrase "common knowledge" as it relates to the doctrine of judicial notice. Consider the following:

> "Before a court will take judicial notice of any fact, that fact must be a matter of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain, and the test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof." Weitzenkorn vs. Lesser, 256 P.2d 947, 40 C.2d 778

> "This court is compelled to take judicial notice only of facts and

> propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute (Evid. Code. § 451) If there is any doubt whatever either as to the fact or as to its being a matter of common knowledge, evidence should be required. (Citing case)" Barriero vs. State Bar of Calif., 471 P.2d 992, 88 Cal. Rptr. 192 (1970)

A court may not take judicial notice of a matter that may be disputed by competent evidence and if there is any doubt as to whether a fact is within the realm of common knowledge, evidence should be required. Brandon vs. Lozier-Broderick & Gordon, 162 P.2d 384, 160 Kan. 506; Communist Party of U.S. vs. Peek, 127 P.2d 889, 20 C.2d 536.

This Court has recognized that insurance contracts are not entered into as other contracts generally are. They are generally prepared after negotiation between the parties. (Rollefson vs. Lutheren Brotherhood, 132 P.2d 715, 63 Idaho 562 (1943)) However, one may not use that judicial recognition as a basis

for a finding that insurance coverage of sufficient limits is available to counteract the exposure which may be placed upon TFCC by the inclusion of CV in its operation. The scope of coverage and limits vary from policy to policy, and certain risks cannot be covered at lall. (Intentional acts, acts of war, etc.) The same rationale denies the court the ability to hypothesize on the ability of the litigants to jointly operate and maintain a canal system in excess of fifty (50) miles in length, particularly when the litigants voluntarily withdrew or excluded that issue from the court's consideration.

F. By Expansion of The Issues Presented Below, TFCC Has Been Denied Due Process of Law.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law;"

The Idaho Constitution contains a similar provision in Article I, Section 13:

> "No person . . . nor be deprived of life, liberty or property without due process of law."

It is submitted that the Supreme Court in this instance in going beyond the parameters set in the lower court by agreement of the parties and expanding upon and adding to the issues considered by the lower court, has prejudiced the respondents by denying them the ability to participate in the formulation of those issues and to respond to them by the introduction of evidentiary facts and applicable law. Such a denial is contrary to the mandates of both the United States and Idaho Constitutions. The significance of those provisions cannot be questioned and the cases recognizing their applicability to the judicial process are legion.

The requirements of the provisions can be stated simply:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." Truax vs. Corrigan, 66 L.Ed. 263, 257 U.S. 332

No less profound statements have been rendered by this Court:

> "Due process of law requires that one be heard before his rights are adjudged." Mays vs. District Court, 34 Idaho 200, 200 Pac. 115 (1921)

> "While the term 'due process of law' is not susceptible of exact or comprehensive definition (citing C.J.S.) . . . it has been said that there can be no doubt of its meaning when applied to judicial proceedings, and as so applied due process of law has been variously held to mean a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial." Gilbert vs. Elder, 65 Idaho 383, 144 P.2d 194 (1943)

> "The elements of the constitutional guarantee of due process in its procedural aspect are notice and an

> opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." Foster vs. Walus, 81 Idaho 452, 347 Pac. 120.

It is clear from the record presented from the lower court that the respondents did not have the requisite notice that the issues of joint operation and maintenance and necessity were to be litigated in this lawsuit, thus denying them the opportunity to be heard on those issues and defend their position. Despite that denial, this court has rendered definitive decisions on those issues which will severely prejudice the respondents in any subsequent litigation on the issues involved. There can be no clearer denial of due process.

II. THE COURT SHOULD HAVE CHARACTERIZED THE ACTION AS AN "EXCHANGE" FOR THE PURPOSES OF IDAHO CODE § 42-105.

The Court suggests that what CV proposes is commingling and not an exchange for which permission would be

required under Idaho Code § 42-105. The court stated that to have required compliance with Idaho Code § 42-105 would have overruled Portneuf I (Opinion, page 12).

A closer reading of Idaho Code § 42-105 shows that the amendment requiring an "agreement" was not added to the statute until 1969. Chapter 300, 169 Idaho Session Laws at page 900 show the additions (the writer has separated the statute to clarify the internal divisions):

Part I "42-105. USE OF NATURAL CHANNELS - MEASUREMENT OF COMMINGLED WATER - APPLICATION FOR RIGHT TO EXCHANGE WATER.-- The water to which a person may be entitled by reason of valid permit or license issued by the department of reclamation of water right heretofore established by diversion and application to beneficial use under the constitution of this state ~~appropriated~~ may be turned into the channel of another stream and mingled with its water, and then reclaimed;

Part II and water may be turned into any ditch, natural channel or waterway from reservoirs or other sources of water supply, and such water may be substituted or exchanged for an equal amount of water diverted from the stream, creek or river into which such water flows, or any tributary thereof,

Part III but in reclaiming the water so mingled, or diverting water in lieu thereof from any such stream, creek, river or tributary, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage.

Part IV Approval of any such exchange of water shall be obtained by filing application for permit to appropriate water under the provisions of section 42-202, Idaho Code, in the event the water to be exchanged is unappropriated public water, or by filing an application to exchange water as provided in this act in theeeeevent the water to be exchanged has been previously appropriated by the applicant under the constitution or statutes of this state. In no case, however, shall any such exchange of water be approved by the department of reclamation until the department has received an agreement in form approved by the attorney general signed by the person proposing the exchange and each person or

organization owning rights to water with whom such exchange is proposed to be made. Any such exchange of water hereafter made without the approval of the department of reclamation as provided in this act shall be invalid."

A logical reading is that a commingling or an exchange, in a natural stream or in a constructed waterway requires an agreement of the parties since the 1969 amendment. A more precise reading of the statute would suggest the legislature was more specific. Part I as above marked could be read logically to allow "commingling" in a "natural stream" only. Part II would allow water in a ditch or waterway to be "exchanged". Part III suggests transmission loss application to both commingling under Part I, and exchanging under Part II. Part IV, however, would require an "agreement" for an exchange to be made in a ditch or constructed waterway authorized under Part II of the statute.

Idaho Code § 42-105 did not require an "agreement" at the time of Portneuf I. Portneuf I would not be overruled by a 1980 court ruling requiring compliance with a 1969 amendment to Idaho Code § 42-105.

The Court states that the "law is the same as it was in 1909 when Portneuf I was decided and in 1922 when Berg was decided." (Opinion, page 13) By labeling the current proposal as a "commingling", even though the statute suggests a "commingling" without permission can only occur in natural channels, the Court suggests that there is a commingling available in ditches and waterways without an agreement. Certainly the amendment by the Legislature in 1969 had some purpose. It may well have been to amend the holding of Portneuf I as to privately owned and constructed ditches. However, by the court's labeling of the

instant transaction as a permissible and unilateral commingling, the result is to emasculate the major requirement of the 1969 amendments to Idaho Code § 42-105. A reasonable reading of Idaho Code § 42-105 requires a conclusion that a so-called "commingling" in a "ditch" or constructed "waterway" requires approval of the parties involved.

The quote from Hutchins which the court cites (1 Hutchins, Water Rights and Laws in the Nineteen Western States, 603) footnotes an Idaho case. The cited case of MacKinnon vs. Black Pine Mining Company, 32 Idaho 228, 179 Pac. 951 (1919), was a case involving a natural channel and would not seem to authorize either a commingling or an exchange in a constructed canal system.

The discussion of commingling by Hutchins in the work just mentioned continues to a discussion of "exchange or

substitution of water", at pp. 66, et. seq. The author says:

"EXCHANGE OR SUBSTITUTION OF WATER

"Interrelationships.--This topic is closely related to (a) use of a natural channel for conveyance of water and (b) commingling and recapture of water. Acts of exchange or substitution may involve one or both of these previous topics, or neither of them. For example:

"(a) Acts of discharging impounded water or direct flow into a stream, and rediverting an equivalent quantity of water at a distant point below, involves them both. Although there is no pretense -- or event a legal fiction -- that the same particles of water are recaptured, the processes of using the channel for transportation, for commingling and recapture, and for exchange of stored or direct flow waters for waters already in the stream are all carried out. This is the case, regardless of whether the downstream diversion is made at the same time as the upstream discharge into the channel, or at an earlier or a later date.

"(b) On the other hand, the acts of discharging into a stream either stored water or direct flow from another source, and of diverting comparable quantities at a higher point or from an upstream tributary, involve neither channel transportation nor commingling and rediversion of this artificial increment."

Commingling and exchange are not mutually exclusive concepts, as Hutchins points out. The CV proposal fits squarely within the example he uses in the above-quoted portion of his work. CV is both "commingling" and "exchanging", in a private canal. Under § 42-105, Idaho Code, consent must be obtained. Any other reading emasculates the 1969 amendment to § 42-105.

III THE DEVELOPMENT OF WATER RESOURCES FOR MAXIMUM ECONOMIC UTILITY IS NOT A PREMISE OF IDAHO WATER LAW.

Beneficial uses of water need not be "economic" in Idaho. The word "economic" does not appear in Article XV of the Idaho Constitution. The article deals generally in terms of "beneficial uses". In fact Article XV, Section 3 dictates that the priority among appropriators prefer domestic water, over agricultural water and both over mining and power uses. In fact, the reverse ranking is

probably true on a present day evaluation of which uses of water would create the maximum "economic" return. The use of water for power is probably more beneficial in economic terms of dollars generated to a power company that can use the water to cool a thermal power plant than is a one-time consumptive agricultural use. The same premise prevails for manufacturing as opposed to agriculture. Certainly agriculture, manufacturing and power would all prevail in an economic comparison with a domestic water use unless to a commercial domestic water enterprise.

Although some Idaho statutes talk in terms of "economical use", none say that a beneficial use of water in Idaho must in fact be economic. Otherwise, this court certainly would not have permitted minimum stream flows, fish and wildlife propagation, and aesthetics to become

"beneficial uses of water". (See In the Matter of Permit Application No. 37-7108, 96 Idaho 440, 530 P.2d 924 (1974). With the exception of Idaho Code § 42-226 which talks about "full economic development of the underground water resources," little regard has been given by the Constitution, Legislature and Court as to whether or not a beneficial use was economic. While early on people wanted development to provide a livelihood, the recent trend has been somewhat the opposite. In 1978 the Idaho Legislature adopted Idaho Code § 42-1501 which allowed the designation by appropriate authorities of certain "minimum stream flows for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." Certainly these uses with the possible exception of transportation and

navigation, are not economic per se. In 1978 the Legislature also adopted Idaho Code § 42-1736A in which certain minimum stream flows were set at various points on the Snake River, namely Milner, Murphy, and Weiser in order to protect the stream flows and the hydro power base. Idaho Code § 42-1736 is not necessarily a statute "consistent with the well recognized policies in this state of maximum economic utility of water resources and the development and reclamation of arid lands." That statute alone will preclude applicants for water permits from successfully diverting and applying to the reclamation of arid lands some 3,300 c/f/s of Snake River water at Murphy. Did the Idaho Water Resource Board make this decision on the economic basis to protect the hydro base?

In 1978 the Idaho Legislature also amended Idaho Code § 42-203 to provide

new criteria to determine whether or not an application to appropriate water should be permitted. The amendment added a fifth criteria for evaluating an application -- "(5) That it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use." No mention is made as to whether or not the local public interest is economic or otherwise. None of the five criteria which control whether or not an application for permit shall be issued pursuant to Idaho Code § 42-203 talks in terms of economics except to determine whether the applicant has "sufficient financial resources to complete the work which he seeks to accomplish".

In the case of Martiney vs. Wells, 91 Idaho 215, 419 P.2d 470 (1966), the Court held that a junior appropriator could not

take water away from a senior appropriator even though the junior could make a more efficient use of the water. This would at least imply that economics must yield to other considerations.

Another "non-economic" decision of late by the Idaho Court was the denial of an application for transfer of a point of diversion, place and nature of use of a water right, Supreme Court Opinion No. 12938, In The Matter of The Application for And Protect Against Application for Transfer Of Water Right No. 11-0290 In The Name of Agricultural Products Corporation; also entitled Beker Industries, Incorporated, Formerly Agricultural Products Corporation, Applicants/Appellants vs. Georgetown Irrigation District, Protestant/Respondent, 610 P.2d 549 (1980). In that decision, the court denied a change in nature of the use from irrigation to manufacturing which

obviously would have been to a more economical.

The recent decisions of the Idaho Legislature, and the Idaho Supreme Court indicate that the trend is not consistently toward "maximum economic utility of the water resources and the development and reclamation of arid lands" of this state. Certainly that general policy cannot support a specific holding if that holding is contrary to other statutory and policy considerations.

IV. THE COURT'S OPINION PERMITS A TAKING WITHOUT COMPENSATION, AND THUS DENIES TFCC DUE PROCESS OF LAW.

In holding that CV need only pay a nominal amount for the property interest acquired by it, the Court has permitted the taking of certain other property interests of TFCC without compensation. Specifically, the Court said at page 19:

> "Similarly, CV should not have to pay a proportionate share of the depreciated historical costs of construction TFCC's existing canal system, since

> TFCC is not being deprived of the existing canal system. In view of the fact that TFCC will retain the right to use the canal system as before, we think TFCC is entitled to only nominal damages for the property interest acquired by CV."

In much of its opinion, the Court's discussion focused on the question of easements. However, as the parties specifically stipulated, CV needs more than the right to only use the easement interests of TFCC. The parties stipulated that the diversion works, including Milner Dam would have to be used by CV. (Clerk's Record, page 96) The easement interest of TFCC consists of the right, as against the servient estate, to locate and maintain a canal. While the interest in the ground itself is an easement, the physical structures located thereon are owned outright by TFCC. Even if we consider that the earthen banks would become appurtenant to the easement and therefore a part of the easement, it is

clear that Milner Dam, which is located in the bed of navigable stream, and the diversion works located in and adjacent to the stream are of much different property interests than the easement itself. The Court's opinion, as previously pointed out, permits CV to jointly operate and maintain the enlarged system, even though that was not agreed to be an issue. For the purpose of discussing where that leaves TFCC, let's assume that it is ultimately determined that joint operation and maintenance is feasible and CV is allowed to condemn on that basis. The Court's opinion would leave TFCC with no monetary compensation for the acquisition by CV of a property interest in the diversion works, Milner Dam, and internal gates. Under the Court's opinion, CV would have the right to operate those diversion works and gates, but would never have paid anything for the right to

do so. The Court creates a co-tenancy in specific items of personal property, or specific appurtenances to real property, without providing that the new co-tenant must ever pay anything for what he gets, that is, the right to use the physical facilities.

There is another aspect of the "taking" which the Court's opinion would omit compensation for. The Court cites two Utah cases at page 19 in support of its proposition that only nominal damages are recoverable. However, recognizing the fact Utah has a specific statute authorization condemning into an existing ditch, the Utah court noted certain material elements to be determined in considering damages. Consideration should be given to the extent, if any, that the diverting appliances were utilized by the condemnor and the extent to which the condemnor would be permitted to make use of any

excess or unused capacity in the existing system. This Court has gone beyond the holding of the courts in the cases cited as support, and foreclosed issues of damages which should be recoverable by TFCC. For example, if the canal has, for a portion of its length, sufficient capacity to accommodate 300 c/f/s of water, that capacity obviously has some value. Even though the facilities of TFCC are not marketable as the parties stipulated, the excess capacity of the system is or may very well be marketable by TFCC. In this regard, the Court has foreclosed any payment by CV for the excess capacity, if any exists, which CV would use. Likewise, CV's proposal would take from TFCC the opportunity to itself enlarge its system and sell the enlarged carrying capacity to some outside interest. This is a property right inherent in the TFCC ownership, which

must be paid for by CV. Therefore, even if the basic easement is only of nominal value, the capability of further and different use of that easement (given agreement with the servient landowners) is an aspect of the property rights of TFCC which must be recognized. The principal was stated many years ago in Lewis on Eminent Domain as follows:

> "If property then consists, not in tangible things themselves but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence that his property may be taken in the Constitutional sense though his title and possession remain undisturbed, that it may be laid down as a general proposition, based upon the nature of the property itself, that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the power of eminent domain, his property is pro tanto taken, and he is entitled to compensation." 2d Ed., Lewis, Section 56, 3d Ed., Lewis, Section 65.
>
> "It is also clear that to take the use of property is to take property within the meaning of the Constitution. It follows that one company

> cannot be authorized to take joint use of another's tracks except by an exercise of eminent domain power. All the cases practically concede this by holding a compensation must be made." 3d Ed., Lewis, Section 423.

Thus, the Court has spoken rather too broadly in saying that only nominal damages may be recoverable by TFCC for the property interest taken by CV, since there are many aspects to the property rights of TFCC quite separate and apart from its bare easement interests as against the servient landowners.

CONCLUSION

TFCC recognizes that it is difficult for judges, like everyone else, to retreat from a position once taken. However, TFCC has not filed its Petition for Rehearing or this Brief with any desire to be critical of the Court itself. The intent was to point out to the Court that certain vital elements of the case have been overlooked by the Court, and that TFCC is now faced with a

decision by this Court on issues which it has never had a chance to litigate. TFCC is merely requesting that this Court decide the issues presented on the record made on those issues. Issues not presented should be left for later cases. TFCC respectfully requests that the Court grant a rehearing, and thereupon withdraw the previous opinion, substituting therefor an opinion addressing only the intended issues.

DATED this 4th day of November, 1980.

Respectfully submitted,

NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

By: /s/John A. Rosholt
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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * * * * *

CANYON VIEW IRRIGATION COMPANY, a corporation, Plaintiff and Appellant, vs. TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY, Defendants and Respondents.	Supreme Court No. 13174 PETITION FOR RECALL OF REMITTITUR

* * * * * * * * * * *

Respondents hereby petition this Court to recall or withdraw its remittitur heretofore entered, for one of the following purposes:

(1) To use the order of recall or withdrawal as a vehicle to modify and limit its previous decision, so as to eliminate the denial of due process created and furthered by the Court, in violation of the rights of Respondents under the 14th Amendment to the Constitution of the United States; or

(2) To permit Respondents 90 days within which to Petition the Supreme Court of the United States to issue a writ of certiorari to review the Court's decision in light of the denial of due process under the 14th Amendment to the Constitution of the United States.

I.

THIS COURT HAS RECOGNIZED A PETITION FOR RECALL OF REMITTITUR AS A MEANS OF PRESENTING IMPORTANT ISSUES TO THE COURT.

A Petition for Recall of Remittitur is not a procedure spelled out in the Idaho Appellate Rules, but this mechanism has been used in at least one other case, where important issues were before the Court. This case also presents issues of critcal importance, not only to Respondents, but to others within the state.

In the case of Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 403 P.2d 859 (1965) the Court used a petition for recall of remittitur to further explain its previous holdings concerning the procedure for demanding (or waiving) a jury trial. Respondent asks this Court to grant this Petition for Recall of Remittitur, and limit its decision to the issues presented to it.

II.

THIS COURT'S DECISION DENIES RESPONDENTS DUE PROCESS OF LAW UNDER THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The 14th Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law;..."

As pointed out in the Brief of Respondents in Support of Petition for Rehearing, the issues of joint operation and maintenance, necessity and the compensation due upon "taking" of property were neither presented to the lower court nor to the appellate court in this instance. The specific issues presented were limited by the parties through a stipulation (R.P. 98, ll. 27-30) and the briefs submitted to the appellate court, along with the respective arguments, conformed to the stipulation entered into in the lower court. Yet, the opinion of this court goes beyond the scope of the issues presented to the trial court and consequently beyond the scope of appel-

late review which should have been followed in this instance. Call v. Marler, 403 P.2d 588, 89 Idaho 120; Wolf Corporation v. Lewis, et al., 11 Ariz. Appeals 352, 464 P.2d 672; Trapton v. Youngblood, 69 Calif. Rpts. 568, 442 P.2d 648.

By going beyond the perameters set forth in the lower court by agreement of the parties and expanding upon and adding to the issues considered by the lower court, this court has prejudiced the respondents by denying them the ability to participate in the formulation of those issues and to respond to them by the introduction of evidentiary facts and applicable law. Such a denial is contrary to the mandate of the 14th Amendment to the Constitution of the United States. The signficance of that amendment cannot be questioned and the cases recognizing its applicability to the judicial process are legion.

The requirements of the amendment as it relates to due process can be simply stated:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rule which governs society." Truax v. Corrigan, 66 L.Ed. 263, 257 U.S. 332.

It is clear from the record presented that the respondents did not have the requisite notice that the issues of joint operation and maintenance, necessity and compensation were to be litigated in this lawsuit, thus denying them the opportunity to be heard on those issues and defend their position. More is required than the mere right or ability to raise ones concern or opposition, after the fact, to the disposition of unpleaded, unraised and untried issues. The right

to an open hearing on the issues is a minimal requirement under the 14th Amendment and the fact that the granting of procedural due process may lead to the same result will not support its denial. Railroad Commission of Calif. et al. v. Pacific Gas and Elec. Co., 302 U.S. 388, 82 L.Ed. 319, 58 S. Ct. 334; Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L.Ed. 1027, 35 S. Ct. 025. This court has rendered definitive decisions on issues not raised below which will severely prejudice the Respondents in any subsequent litigation on the issues involved. There can be no clearer denial of due process.

DATED this 14th day of December, 1980.

NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

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SUPREME COURT
STATE OF IDAHO
Boise, Idaho

SUPREME COURT
NO. 13174

November 26, 1980

CANYON VIEW IRRIGATION COMPANY, a corporation,

Plaintiff-Appellant,

vs.

TWIN FALLS CANAL COMPANY, a corporation, its BOARD OF DIRECTORS, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY,

Defendants-Respondents.

* * * * * * * * * * *

GENTLEMEN:

In the above entitled cause the Court has today denied Respondents' Petition for Rehearing and allowed costs to Appellant in the amount of $170.00. No Attorney Fees allowed.

/s/ R. H. Young
CLERK OF THE SUPREME COURT
STATE OF IDAHO